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IN THE

Supreme Court of the United States

October Term, 1955

No. 497

HANS ZIMMERMAN,

Petitioner,

vs.

DELOS C. EMMONS,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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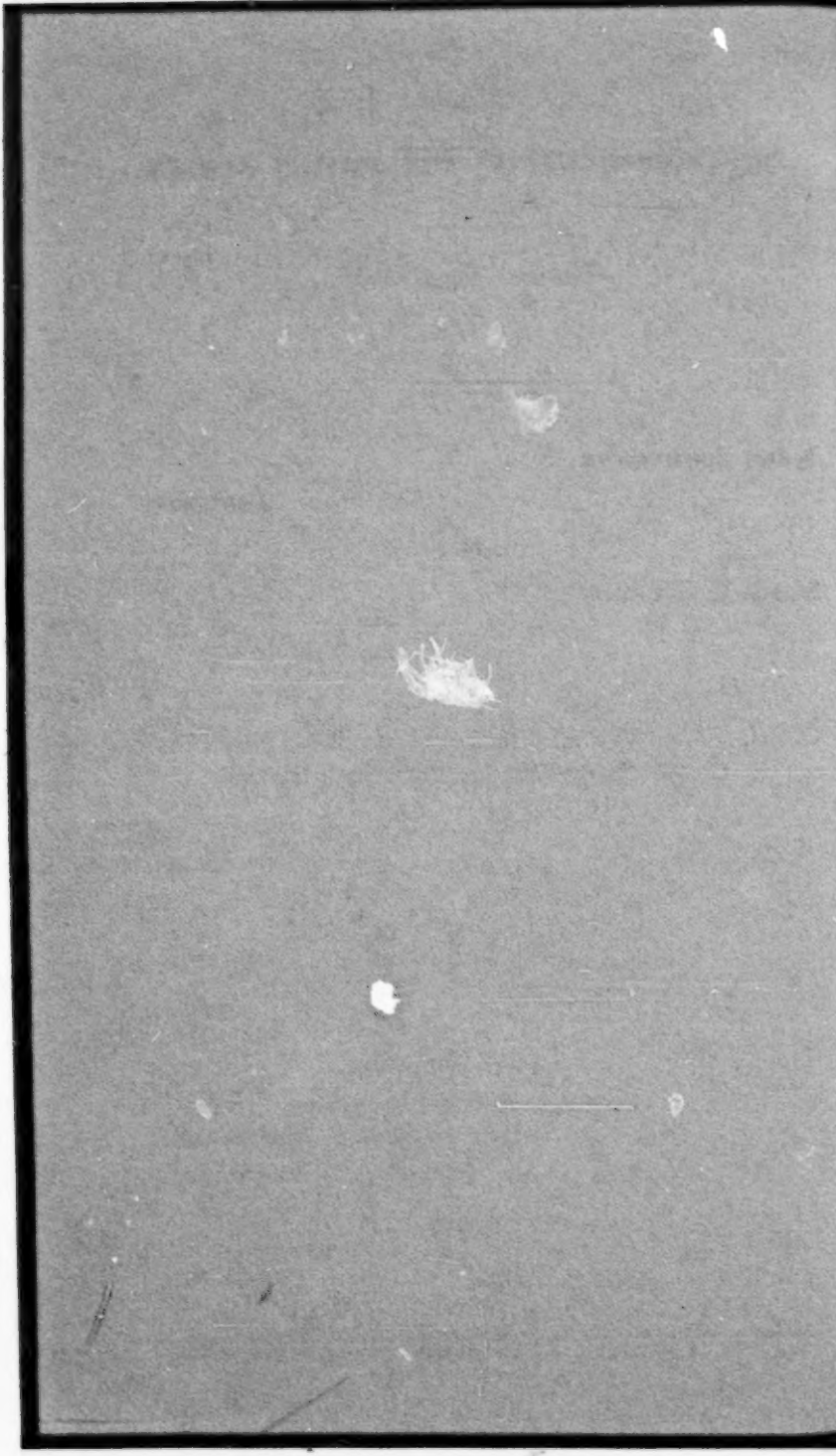

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35 American Bar Association Journal, pp. 365, 366, McCulloch, Now It Can Be Told: Judge Metzger and the Military 12, 16
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2 Baron & Holtzhoff, pp. 767, 797, 810 17
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Chaffee, Free Speech in the United States, pp. 243-244 26
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22 Forham Law Review, pp. 155, 180, McNiece & Thornton, Military Law From Pearl Harbor to Korea 7

Krasner, Andrew Jackson, The Gentle Savage, Bretano (1929), p. 248 28

Manual of Courts Martial (1928), p. 14 20

Manual of Courts Martial (1951), p. 232 20

National Security and Individual Freedom, Chap. 2 (Harv. Univ. Press, 1955) 26

New York Journal American, Nov. 13, 1945 16

Report of the President's Committee on Civil Rights, To Secure These Rights (U. S. Govt. Ptg. Off. 1947), pp. 129, 130 8

Resolution, ABA House of Delegates, in Convention at Philadelphia, August 26, 1955 7

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Petitioner, Hans Zimmerman, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgment affirming a judgment of the United States District Court for the District of Hawaii.

Opinions Below.

The District Court, prior to trial, rendered two opinions (74 F. S. 933 and 78 F. S. 421), only the latter being pertinent to this petition. That opinion is appended hereto as Appendix "A."

No opinion was written by the trial court upon the denial of the motion for summary judgment, at the conclusion of the trial or upon the denial of motion for new trial.

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The opinion of the court below is reported at 225 F. 2d 97. It is appended hereto as Appendix "B" [C. A. 3].[1]

The opinion of the court below in the previous habeas corpus case is reported in *Ex parte Zimmerman*, 132 F. 2d 442. It is appended hereto as Appendix "C."

This Court's order dismissing, on grounds of mootness, the petition for writ of certiorari filed thereafter is reported as *Zimmerman v. Walker*, 319 U. S. 744. It is appended hereto as Appendix "D."

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed is August 1, 1955, and the time of its entry is the same;

2. No rehearing was requested nor was any extension of time within which to petition for certiorari requested;

3. This court has jurisdiction to review the judgment in question under the provisions of 28 U. S. C. 1254(1).

Questions Presented for Review.

1. Was petitioner, a citizen of the United States, denied due process of law, for which respondent, a military officer, is liable in damages, when he, petitioner, was incarcerated by respondent without a hearing having the rudimentary demands of due process?

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[1]The record was, by leave of the court below, not printed. It consists, exclusive of exhibits, of three parts: clerk's transcript in the trial court [Vol. I of record certified to this Court by the Clerk of the court below] [C. T.]; reporter's transcript [Vols. II through IX of record certified to this Court by the clerk of the court below] [R. T.]; and the record in the court below [Vol. X of record certified to this Court by the Clerk of the court below] [C. A.].

2. Was petitioner denied due process of law, for which respondent is liable in damages when respondent caused petitioner's removal from the mainland United States, where he had been sent for incarceration, back to Hawaii for continued incarceration, for the specific purpose of preventing petitioner from obtaining a judicial hearing, on the mainland, as to the legality of his detention?

Statement of the Case.

Basis of Federal Jurisdiction in the District Court.

The District Court had jurisdiction under the provisions of 28 U. S. C. 1331.

The District Court also had jurisdiction under the provisions of 28 U. S. C. 1332.

The trial court held that it had jurisdiction (78 F. Supp. 421).

Facts.

This case involves the drama of a lone, loyal patriotic American,[2] who was incarcerated by a powerful General of the United States Army without a hearing affording even the minimum rudiments of due process, and whose efforts to obtain judicial relief as to the legality of the detention were frustrated by the General who moved petitioner about the country to prevent the courts from hearing the matter and who, in order to moot the case before this Court, released petitioner from custody but, at the same time, banished and exiled petitioner from his home.

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[2] *Cf.* this admission by respondent's counsel [R. T. 38, 39]:
"The Court: . . . are you going to contend that the plaintiff here was disloyal?
"Mr. Taylor: No sir."

Because the details lend themselves to recounting better in connection with the argument made below, more detailed facts will be set forth hereinafter at that point.

Reasons for Allowance of the Writ.

1. The case involves the important question "as to the duty and authority of a military commander in a combat zone in which martial law has been declared and the writ of habeas corpus suspended, and as to the requirements of due process in such a situation." So recognized by respondent in his brief in the court below (the portion of the preceding sentence in quotes is from pages 3 and 4 thereof), said brief being signed by Warren E. Burger, Assistant Attorney General of the United States, and by Major General E. M. Brannon, the Judge Advocate General of the United States Army.

2. In 1943 this Court was virtually imposed upon and prevented from hearing and deciding this important question by respondent, upon the filing of petitioner's then petition for writ of certiorari, releasing petitioner (the case was then a matter of habeas corpus) in order to moot the case. The game the military played during the war to avoid and abort judicial review of their actions will be discussed below. At that time this Court was helpless to protect itself from the patent plan to defeat its jurisdiction. It is under no such disability today.[8]

3. The court below has decided important questions of federal law which have not been, but should be, settled

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[8]We attach, as Appendix "E", petitioner's reply to the suggestion of the Government in *Zimmerman v. Walker*, #283, October Term 1942, of this Court, that that proceeding was moot because of the release of petitioner on the mainland. What petitioner there alleged on information and belief, he has proved in this case. Now this Court can do something about it.

by this Court, namely, whether, regardless of the right of a military commander to incarcerate a citizen without charge, such military commander is liable in damages for (1) moving the citizen out of his command in order to avoid a court determination as to the validity of the detention, and/or (2) causing the removal of the citizen back into his command in order to avoid a court determination as to the validity of the second detention of the citizen in the place to which the commander sent him, and/or (3) banishing the citizen from his home and removing him from the Commander's jurisdiction, again, in order to avoid a court determination as to the validity of the continued detention.

Never before has this Court been presented with these facts. The very nature of them calls for review by this Court of a judgment holding the officer harmless under such circumstances.

4. The court below has decided a federal question in a way in conflict with applicable decisions of this Court.[4] All of the cases cited in the footnote and others, stand for the proposition that damages will be awarded against federal officers, including military commanders, who exceed their jurisdiction and deprive citizens of federally protected rights.

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[4]Such as: *Murray v. Schooner Charming Betsy*, 2 Cranch (U. S.) 64, holding the naval Captain of the U. S. S. Constellation liable in damages for seizing in good faith a Danish vessel, believed to be American, found in possession of the French, then our enemies; *Little v. Barreme*, 2 Cranch (U. S.) 170, holding the Naval Captains of American vessels liable in damages for capturing Danish vessels, believed in good faith to be American vessels bound for French ports in violation of the Non-Intercourse Act. It was in this case that Chief Justice Marshall wrote his famous opinion in which he confessed that his first view was that there could be no liability under such circumstances, but later, upon reflection, changed his mind; *Mitchell v. Harmony*, 13 How.

Certainly the right not to be incarcerated without due process of law, and the right to seek a court determination of the validity of that incarceration are federally protected rights, just as much as, for example, the right to vote. (*Wiley v. Sinkler,* 179 U. S. 58; *Swafford v. Templeton,* 185 U. S. 487; *Nixon v. Herndon,* 273 U. S. 536; *Nixon v. Condon,* 286 U. S. 73; *Lane v. Wilson,* 307 U. S. 268; *Smith v. Allwright,* 321 U. S. 649.)

5. The question as to the right of the military to incarcerate citizens is not an academic question nor is the reach of this case confined only to petitioner's hurt. There is now legislation on the books (50 U. S. C. 811-826) authorizing the establishment of detention camps in the event of a future emergency. In this legislation Congress has marked the boundaries and due process required when emergency detention is to be effected by the civilian authorities. But the boundaries beyond which military authorities cannot go are still unmarked. This Court should hear this case and chart that course.

In its recent convention, the American Bar Association recognized the importance of problems such as raised in this case and appointed a committee to deal with the legal

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(U. S.) 115, holding an Army Colonel liable in damages during the war with Mexico, for seizing property believed in good faith by the Colonel to be about to be used in illicit trade "injurious to the interests of the United States"; *Bates v. Clark,* 95 U. S. 204, holding the Commander of Fort Seward liable for seizing liquor in territory believed in good faith to be Indian country; *Beckwith v. Bean,* 98 U. S. 266, agreeing that Union Army Provost Marshals are liable in damages for assault and battery and false imprisonment for arresting, under orders, "at a period in the country's history when the intensest public anxiety for the fate of the Union pervaded all classes;" and see *Philadelphia Co. v. Stimson,* 233 U. S. 605, 619, wherein Justice Hughes made it very clear that officers of the United States are liable in damages in situations such as at bar, citing many cases.

and administrative problems that can be expected to arise in the event of an atomic attack (Resolution, ABA House of Delegates, in Convention at Philadelphia, August 26, 1955).

The question is constantly and currently commanding the attention of text writers (*e.g.*, J. Garner Anthony, *Hawaii under Army Rule* (Standard Univ. Press, 1955), pp. 119-123; McNiece & Thornton, *Military Law from Pearl Harbor to Korea,* 22 Fordh. L. R. 155, 180).

The problem of military power versus civilian supremacy is a recurring one, and one which this Court considers to be of utmost importance (*Cf., United States ex rel. Toth v. Talbott,* No. 3, Oct. Term 1955; *Maj. Gen. W. W. Eagles v. United States ex rel. Horowitz,* 329 U. S. 317). So important, indeed, that a special term of this Court was called to consider the matter (*Ex parte Quirin,* 317 U. S. 1).

While it is to be hoped that Mrs. Schwimmer's prophecy that war will disappear (*United States v. Schwimmer,* 279 U. S. 644, 654) will come true, and soon, Mr. Justice Holmes words in her case, *(Ibid.)* "I do not share that optimism," are probably, unfortunately, still sound today. However, because of that fact, all the more is the reason for this Court to hear the case at bar now so that in the calmness before the holocaust there may be guidance in the event of future necessity.

6. Respondent himself admitted [Emmons Dep. 82][5] that the treatment given petitioner caused serious hard-

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[5]A number of depositions were taken before trial, including that of respondent here. Respondent's deposition, as well as the others, were on file and were part of the documents relied upon in support of plaintiff's motion for summary judgment [C. T. 157].

ship and damage, was a mistake and that there ought to be compensation paid, albeit, he said, by Congress.[6] Others agree. See Hughes, *Dr. Zimmerman Loses Verdict in Hawaiian Martial Law Suit,* Bull. No. 7, The Judge Advocate Journal, March 1951, where the writer says (pp. 5 and 7):

> ". . . There ought therefore to be some method by which he (a person such as petitioner) can vindicate himself.
>
> ". . .
>
> ". . . The paradox is that in a democracy it makes sense that in a war a citizen may be asked to lose his life; it makes no sense that he should be asked to lose his reputation."

However, whether a citizen, placed in the position of petitioner, should be compelled to depend upon the largess of Congress or is entitled under law to compensation for such treatment, should be decided by this Court. The importance and high office of the civil suit for damages in a situation such as in this case has been recognized. (*Bell v. Hood,* 327 U. S. 678; *Wolf v. Colorado,* 338 U. S. 25; Report of the President's Committee on Civil Rights, *To Secure These Rights* (U. S. Govt. Ptg. Off. 1947) pp. 129, 130; *Cf.,* cases, *supra,* f.n. 3.) So, too, have the hazards and pitfalls (*e.g.,* dissent in *Wolf v. Colorado,* 335 U. S. 25, 42). The remedy has, indeed, been termed "illusory" *(Ibid.),* a description which covers this case unless this Court grants review.

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[6]And petitioner agrees with respondent. Indeed he agreed with respondent [R. T. 110, 111] that, in the event of a verdict in petitioner's favor he would first seek legislation from Congress rather than immediately seek satisfaction from respondent's personal assets.

ARGUMENT.

Preliminary Statement.

Although the trial was lengthy and the transcript and evidence voluminous, there is no real dispute of fact. Virtually nothing was developed at the trial which was not before the court on petitioner's motion, except for damages, for summary judgment which motion the trial court denied.[7]

Accordingly, although petitioner is convinced, and again asserts, that the verdict of the jury is contrary to and not supported by the evidence, and is contrary to law,[8] in the factual discussion here petitioner will rely upon the material which was before the court on the motion for

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[7]The court below, brushed aside petitioner's contention that this was error, saying, simply [C. A. 4] that "the pleadings, depositions and admissions on file, together with the affidavits, did not, . . . show that there was no genuine issue as to any material fact and that appellant was entitled to a judgment as a matter of law." The court did not point to any material fact as to which there was a genuine issue. Respondent also argued below, that the denial of a motion for summary judgment cannot be reviewed on appeal, it being a mere interlocutory order, a contention apparently even rejected by the court below, and, in any event, erroneous. See, for example, *Guardian Assurance Co. v. Quintana,* 227 U. S. 100, 103; *Skirvin v. Mesta,* 141 F. 2d 668 (C. C. A. 10, 1944); *Satterlee v. Harris,* 60 F. 2d 490, 491 (C. C. A. 10, 1932); *Cohan v. Richmond,* 86 F. 2d 680, 681 (C. C. A. 6, 1936).

[8]The court below [C. A. 4] held that this contention "cannot" be considered because no motion for directed verdict was made. In this the court erred in two respects (1) a request for an instruction directing verdict for plaintiff was made (see plaintiff's requested instruction No. 13 [C. T. 256].) This is the same as a motion for a directed verdict (*Hartford Life and Annuity Co. v. Rensell,* 144 U. S. 439, 451; *Wiborg v. United States,* 163 U. S. 632, 657; *Clyatt v. United States,* 197 U. S. 207, 221); and (2), even if such a motion were not made, the court should have considered the point in order to prevent the manifest miscarriage of justice which has occurred here. (2 Baron & Holtshoff, §1081, p. 781; *Clyatt v. United States,* 197 U. S. 207, 221, 222; *Wiborg v. United States,* 163 U. S. 632, 657.)

summary judgment, material which came entirely from the lips of respondent, or his co-defendants,[9] from the official file maintained by the Army on petitioner, from admissions in the answer or as the result of requests for admissions.

I.

Respondent Denied Petitioner Due Process of Law, Acted Arbitrarily and in Abuse of His Authority and Discretion by Moving Petitioner From One Place to Another in Order to Evade, Abort and Frustrate the Judicial Processes of the United States.

Petitioner, Dr. Hans Zimmerman, born in Germany [C. T. 150], became an American citizen [C. T. 149] by choice [C. T. 150]. He volunteered for and served in the United States Army from 1929 to 1932 [C. T. 141]. The day after Pearl Harbor, he went to the Tripler Army Hospital in Honolulu, offered the use of his clinic, offered to take care of 20 patients and look after them there [C. T. 144]. He was rewarded by being arrested that day [C. T. 179; admitted by answer] by the military because he was on a list prepared by the FBI of those who should be apprehended in the event of war with Germany [Shivers Dep. 182].

On December 17, 1941, respondent became Commanding General of the Hawaiian Department and remained such through June 1, 1943 [C. T. 31]. On February 17, 1942, respondent ordered petitioner interned for the duration of the war [C. T. 151, 149].

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[9]At the time of the motion there were defendants in the case other than the present respondent.

On February 20, 1942, the day after the petition for writ of habeas corpus was filed on petitioner's behalf, petitioner was removed from Hawaii by order of respondent [C. T. 181, admitted by answer; Bicknell Dep. 86].

The reasons given by respondent for removing petitioner from Hawaii were three [Emmons Dep. 31]: the camp was overcrowded, petitioner would be highly exposed in the case of an attempted Japanese attack and *petitioner was not potentially dangerous on the mainland United States.*

On the United States mainland, petitioner was imprisoned and detained at Camp McCoy, Wisconsin [C. T. 181; admitted by answer]. Nevertheless, despite these reasons for removing petitioner from Hawaii to the mainland, two months later, in April, 1942, respondent ordered petitioner removed from the mainland back to Hawaii to the very same camp in which he had been before [C. T. 181; admitted by answer], in order to prevent petitioner from filing a court suit on the mainland to test the validity of his detention there [Emmons Dep. 33, 61].[10] Before ordering petitioner's return to Hawaii, respondent knew that a petition for writ of habeas corpus on behalf of petitioner was about to be filed on the main-

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[10]Indeed it is clear, and the point will be commented upon in more detail below, that respondent was determined to do everything in his power, including a show of force, to prevent the Courts of the United States from doing their duty. Thus, the record shows this: On February 19, 1942 petitioner's wife filed in the United States District Court in Hawaii the petition on his behalf for writ of habeas corpus [C. T. 181; admitted by answer]. Respondent did not feel that Judge Metzger, before whom the petition was to be heard, was "liberal minded" and he felt that the military did not have sufficient evidence to resist the petition for writ of habeas corpus before him [Emmons Dep. 35]. Accordingly, when the matter came up on February 20 in Judge Metzger's court, the

land [Emmons Dep. 34] and that such a petition could not be resisted if filed there [Emmons Dep. 33].

It is clear, accordingly, that from April, 1942 on, respondent was holding petitioner prisoner, not for military necessity, but plainly, boldly and simply in order to thwart the right of petitioner to resort to the courts on the mainland, where, in respondent's own words, petitioner was *not* potentially dangerous [Emmons Dep. 31]. By that time Executive Order 9066 had been promulgated by the President [C. T. 87; 7 F. R. 1407] empowering Military Commanders on the mainland to prescribe military areas with respect to the right of any person to remain in or out of and with respect to detention therein. (*Cf.*, exclusion of the Japanese from the Pacific Coast, *Korematsu v. United States,* 323 U. S. 213.) But respondent was not content to trust the courts on the mainland. He thrust out his long arm of authority clear across the ocean, even past the Western Defense Command on the Pacific Coast and deep into the Middle West to bring petitioner back to the very camp from which he had been removed; all this—solely and simply to defeat *habeas corpus* efforts by petitioner.

Were there nothing else in the case, petitioner was entitled to summary judgment, save as to damages, for this

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courtroom and the corridors were crowded with soldiers of the United States Army bearing arms. (See the account of this event in Judge McColloch's article, *"Now it can be told: Judge Metzger and the Military,"* 35 A. B. A. J1. 365, 366.) Judge Metzger denied the writ, although he felt it should issue, because he was under coercion by reason of Respondent's General Order No. 57 prohibiting, under heavy penalty, its issuance. The judge said: "I feel that the court is under duress by reason of the order and not free to carry on the function of the court in a manner in which the court conceives to be its duty." (The whole text of the order is in the records of the habeas corpus case.)

alone. Certainly at the very least, the trial court should have, pursuant to Rule 56(d), made an order specifying the fact that petitioner had been brought back by respondent to Hawaii from the mainland in order to prevent petitioner from obtaining a hearing before the courts on the mainland as to the validity of his detention there.

The action of respondent in thus trying, or, rather, succeeding, in preventing the courts from doing their duty, is in stark contrast to the duty this Court has said the military has to aid the courts, even in times of stress, not to thwart them.

In *Sterling v. Constantin*, 287 U. S. 378, 404, this Court, through Chief Justice Hughes, said:

> ". . . Complainants had a constitutional right to resort to the Federal court to have the validity of the Commission's orders judicially determined. . . . If it be assumed that the Governor was entitled to declare a state of insurrection and to bring military force to the aid of civil authority, the proper use of that power in this instance was to maintain the Federal court in the exercise of its jurisdiction and not to attempt to override it; to aid in making its process effective and not to nullify it, to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared . . ."[11]

Mr. J. Garner Anthony, in his book, *Hawaii Under Army Rule*, has this to say on the matter at page 19:

> ". . . For example, the initial arrest and internment of persons of questionable loyalty after the

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[11]Universal Declaration of Human Rights, adopted by the United Nations General Assembly on December 10, 1948 (Art. 8):

> "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

> suspension of the privilege of the writ would appear to be fully justified. A different question, however, is raised by the acts of military officers subsequently removing the internees from Hawaii and interning them on the mainland of the United States and thereafter again returning them to Hawaii for internment behind barbed wire on Sand Island to avoid a challenge to their detention in places where the privilege of the writ was not suspended. In such a case internment of a citizen cannot be justified upon grounds of security."

After bringing petitioner back to Sand Island, no further movement was made of petitioner's body until February 11, 1943 [C. T. 121] when he was removed to the mainland United States and released on March 12, 1943 [C. T. 181; admitted]. The story of this release is as a result of a remarkable sequence of events.[12]

Although the requirements of respondent's office were that no internee was to be paroled unless he applied therefor [Emmons Dep. 77], an exception was made in petitioner's case *(Ibid.)*. Why?

On December 10, 1942, the court below, Judge Bert Haney dissenting, affirmed, 2-1, the denial of the writ of habeas corpus [C. T. 181; admitted by answer; 132 F. 2d 442]. On December 24, 1942, respondent received a Secret cable from the Judge Advocate General suggesting the parole of petitioner in view of the favorable decision and advising that it was not known whether petitioner would appeal to this Court but that "parole prior to appeal would be more effective than after" [C. T. 131]. On

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[12]Excerpts from the cables and other documents leading up to the release of petitioner are set forth hereinafter as Appendix "F".

December 27, 1942, respondent replied that he deemed it not advisable to parole petitioner at that time, *not*, mind you *because of security reasons,* but because of the inference that would be drawn "that he (petitioner) was merely being held for the purpose of perfecting a legal position" [C. T. 130]. But on February 11, 1943, respondent did order petitioner's release on the mainland [C. T. 134]. Again, we ask: Why?

On February 8, 1943, petitioner's attorney wrote petitioner enclosing a letter from petitioner's present attorney, advising that he had recommended that the American Civil Liberties Union take petitioner's case to this Court by way of petition for writ of certiorari [C. T. 122, 123].

Then came respondent's fast action deciding to release petitioner [C. T. 121]. Though, supposedly, petitioner was being held for security reasons, respondent did not even consult his security officers or the FBI concerning the release, and they had no part in it [Bicknell Dep. 64 74, 76, 79, 80, 82, 111]. The release had no relationship to security reasons [Bicknell Dep. 91], and neither the security officers nor the FBI knew about it until after respondent had decided to effect the release [Bicknell Dep. 112; C. T. 136; Shivers Dep. 204, 212, 213].

But respondent's interest in petitioner was not yet ended. On April 4, 1943, respondent was notified that petitioner had been released [C. T. 128]. And on April 5, 1943, respondent notified the Adjutant General that petitioner had been released [C. T. 126]. Thereupon, this Court received a suggestion on behalf of respondent that the case was moot because of the release (No. 823, Oct. Term, 1942). After this Court's order of May 3, 1943, denying the petition on the ground of mootness, respondent was notified by cable [C. T. 125].

Thus did respondent thwart petitioner in his efforts to obtain judicial review of his case. Thus did respondent, contrary to *Sterling v. Constantin,* 278 U. S. 378; *Ex parte Mulligan,* 4 Wall. (U. S.) 2; and *Duncan v. Kohanomoku,* 327 U. S. 304, seek every avenue of escape from the Constitution and do everything in his power to sustain the power of the military over the civilian.

The mooting of cases by the military during the war is no secret and has been commented upon in many places (N. Y. Journal American, Nov. 13, 1945, set forth in McColloch's article, 35 ABA Jl. 365; Anthony, *Hawaii Under Army Rule,* pp. 18, 75, 76; see also *Steere v. Spurlock,* 324 U. S. 868, cert. den. "on the ground that the case is moot"; *Ex parte Seifert,* No. 296 DC D Haw.; *Ex parte Glockner,* No. 295 DC D Haw.). Judge McLaughlin in his essay *"And How They Did It"* (92 Cong. R. A. 4669, A 4671) has this to say:

> "Why, you ask did the Army release Zimmerman? Because, Gentlemen, Zimmerman had appealed to the Supreme Court of the United States upon constitutional grounds and the army would not face the Supreme Court. That is why."[13]

Accordingly, there is every reason why this Court should now, at long last, hear petitioner's case.

In the discussion of the facts above, we have kept to the material before the court on the motion for summary

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[13] *Cf.* similar maneuvering during the Civil War and reconstruction period. (2 Warren, *The Supreme Court in United States History,* p. 491 *et seq.*) *Cf.* Appendix "E" attached hereto.

judgment. If the evidence adduced at the trial is considered, petitioner's case is even stronger.

Thus, at the trial, respondent said this [R. T. 500]:

> ". . . I am perfectly frank in admitting that we returned Dr. Zimmerman and others back to Sand Island (Hawaii) because we did not want them liberated on the mainland as a result of a writ of habeas corpus."

We submit that nothing more is needed for petitioner to have been entitled to his instruction number 13 [C. T. 256] that the detention of petitioner by respondent was illegal and that petitioner was entitled to damages in accordance with the instructions of the court. As in *Tracy v. Swartout*, 10 Pet. (U. S.) 80, 96:

> "The facts of the case were clearly established; and indeed were not controverted; and the matter of the damage was the only matter of investigation for the jury."

The trial court refused to give the instruction.[14] This alone, likewise, even if nothing else were in the case,

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[14]There were numerous other errors in the instructions. Respondent's counsel himself called them confusing [R. T. 2325]. Thus, the court clearly erred in instructing [R. T. 2275, 2276] that the decision of the court below on the habeas corpus case determined the legal rights of petitioner as of the date of that decision. See *Gelpi v. Tugwell*, 123 F. 2d 377, 378 (C. C. A. 1, 1941). See, also the diametrically opposed instructions the court gave [R. T. 2267, line 11—2268, line 2; 2276, line 2—2278, line 17] as to good faith. However, because there are larger issues in this case, we do not dwell on the error of the instructions, although we urge them as error. Respondent's argument to the court below, rejected there, by the way, that petitioner cannot urge error in instructions because no exceptions were taken is contrary both to the law and the record [2 Baron & Holtzhoff 810, 797, 767; R. T. 2036, 2037, 2364; C. T. 239-274, 278-296].

entitled petitioner to the granting of his motion for new trial.[15]

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[15]In his brief in the court below, respondent argued that the denial of the motion for new trial was not subject to review because no motion for directed verdict or for judgment n.o.v. had been made. The court below did not go along with respondent on this but did [C. A. 6] hold that there had been no abuse of discretion in denying the motion for new trial. Both the court and respondent are in error. As seen [C. T. 256], a motion for directed verdict was made by the requested instructions. And, we submit, it was a gross abuse of discretion, in view of the virtual factual agreement, for the court to have permitted the verdict to stand and permit a manifest miscarriage of justice. In effect, the jury decided no factual issue; it decided questions of law, namely whether petitioner had been denied due process. This conclusion "appropriately (to) be drawn from the whole mass of evidence is not . . . the ascertainment of the kind of 'fact' that precludes consideration by this Court." (*Baumgartner v. United States,* 322 U. S. 665, 671.) Particularly since such a decision "here for review cannot escape broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship." (*Ibid.*) Accord: *Watts v. Indiana,* 338 U. S. 49, 51: "But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication. . . . Especially in cases arising under the Due Process Clause is it important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits. . . ."

II.

Petitioner Was Not Afforded a Hearing Consistent With the Rudimentary Requirements of Due Process.

At the outset petitioner wants to make it clear that when he claims the right to a fair hearing, he does not mean one with all the trappings of a jury trial. He agrees with respondent (Br. 25 in court below) that he is entitled to "the best hearing possible under the circumstances." Such a hearing petitioner did not get.

If there was time, in the military situation extant on December 20, 1941, to give him any hearing at all, and there was, because proceedings were held [C. T. 140] petitioner was entitled to one that at least resembled justice and was not a sham and an illusion.[16] This is equally true in times of peril as well as in times of calm (*United States v. Nugent,* 346 U. S. 1, 9; *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U. S. 123, 162: "The requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; . . ."; *Chew v. Colding,* 344 U. S. 590). But, as this Court said in *I. C. C. v. Louisville and Nashville R. R. Co.,* 227 U. S. 88, 93:

> "Manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute."

It is sobering to consider that a soldier in the Army, one, therefore, clearly under the jurisdiction of the mili-

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[16]Petitioner's "hearing" appears at four places in the record: as Plaintiff's Ex. A, Defendant's Ex. 16, at R. T. 185 and attached in support of plaintiff's motion for summary judgment [C. T. 140-155]. The transcript thereof is a complete record of everything that took place [R. T. 916; Freund Dep. 11].

tary (*Cf., Duncan v. Kohanomoku,* 327 U. S. 304), would have the right, even during combat, to a court martial, which gives far more due process than petitioner was afforded here. (See Manual of Courts Martial (1928), 14; (1951) 232.)

Petitioner *to this day* does not know, nor does anyone else, why he was detained. This is all the more remarkable because not once during the long trial did respondent attempt to produce any facts to justify his keeping petitioner a prisoner; *i.e.,* that facts concerning petitioner which would show him to be a security risk (*Cf., Mitchell v. Harmony,* 13 How. (U. S.) 113, 135, 137).

On the contrary, respondent himself testified:

> That "we did not have evidence, and I am using that in the legal meaning that is acceptable by a court, in the case of Dr. Zimmerman, to justify his being brought before a military commission" [R. T. 371], even though it was his understanding that "a military commission will accept evidence that a civil court normally will not accept" [R. T. 373; to the same effect, Emmons Dep. 20].
>
> That his basis for believing that petitioner was potentially dangerous was that "any person who was born in Germany, and who had relatives in Germany, and who had certain reports against him" was "potentially dangerous" [R. T. 376; Emmons Dep. 23].[17]
>
> That he "didn't have any evidence" that Zimmerman would communicate to the Germans or Japanese the damage which the Japanese had done at Pearl

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[17]Dr. Zimmerman had relatives in Germany: a mother, a brother who had been interned because he was against Hitler and another brother who, before the war, had been superintendent of a shipyard [C. T. 141, 142].

Harbor [R. T. 378], a matter which was of common knowledge in Hawaii [R. T. 377], and that he did not know what evidence the intelligence agencies had [R. T. 378; Emmons Dep. 17].

That he "certainly didn't think that Dr. Zimmerman had any evidence" of the damage to our fleet [R. T. 387].

That he "did not remember of seeing any intelligence reports in this case" [R. T. 439].

But that he "knew the type of information that the FBI had collected, and, as I said, it came from gossip, it came from confidential agents, it was hearsay, it came from anonymous letters, it came from their own agents, it came from various sources . . ." [R. T. 521].

That "I saw no such evidence" (whether gossip, or rumor or any form whatsoever) that Dr. Zimmerman had pro-axis leanings and at numerous times suggested that the greatness of Hitler would eventually make him the ruler of the world [R. T. 241], and that he did not think Dr. Zimmerman was a spy [R. T. 241; Emmons Dep. 21].

What we have, therefore, is a secret, one-sided determination (*Cf., Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 170; and see *Eagles v. United States ex rel. Samuels* 329 U. S. 304, 313, 315, emphasizing a draft registrant's right to be apprised of the information in his file so that he could "explain or correct it or deny it," for "secrecy and anonymity are not congenial to our traditions of procedure").

Title II of the McCarran Act, known as the Emergency Detention Act of 1950, makes it very clear that Congress considers, even in times of the most dire emergency, that

the grounds for proposed detention of civilians must be made known in order to comport with fundamental fairness. Thus, under the Act (Sec. 102; 50 U. S. C. 812) the President is authorized to declare the existence of an Internal Security Emergency in the event of invasion, war or insurrection within the United States in aid of a foreign enemy. Certainly here, the matter of security is as great as in the case at bar. Yet even in this great emergency we find that warrants for arrest may be issued only on probable cause supported by oath or affirmation (Sec. 104(a); 50 U. S. C. 814(a)). Even at the preliminary hearing, the detainee shall be informed of "the grounds upon which application was made for his detention" (Sec. 104(d)(1); 50 U. S. C. 814(d)(1)). Provision is made for review by a Detention Review Board (Sec. 109; 50 U. S. C. 819) and again the requirement of due process is made mandatory. Finally judicial review is provided for (Sec. 111(a); 50 U. S. C. 821(a)).

When it is noted that the grounds for detention under this Act are (Sec. 104(a); 50 U. S. C. 814(a)) "reasonable ground to believe that such person probably will engage in, probably will conspire with others to engage in acts of espionage or sabotage" it is at once apparent that security is also at stake but that nevertheless Congress provided for the minimum of due process.

From the above, it is thus manifest that the barest minimum of due process required that petitioner be apprised of at least a summary of the adverse evidence and of the grounds for the detention. If it be claimed that such a summary could not be given at the time of the "hearings" in December, 1941 (although no good reason appears why such could not be done) certainly when respondent *later* did review the cases with an idea of

releasing some [Emmons Dep. 24], there could be no conceivable reason for not affording petitioner that minimum *then*. And nowhere does there appear any justification as to why appellant could not have been apprized of the grounds for his detention. Nor is any explanation made why, at the *very* least, the findings could not have been communicated to petitioner, so that at least petitioner would know what respondent had "found" against him.

An examination of the "hearings" and the "findings" will demonstrate the point.

Thus the "findings" of the Board [p. 10 of Hearing attached to motion for Summary Judgment; C. T. 149] state that "the evidence presented by the FBI shows that the internee had pro-Axis leanings." Is there any reason at *all* why petitioner could not have been given a summary of the information upon which this finding was to be made so that he could meet the charge by other than a mere denial? This is especially signficant when we note the unequivocal endorsements given by the witnesses brought by appellant, all outstanding men of the highest reputation.[18]

Next (*Ibid.*) the Board "found" that the internee "at numerous times suggested that the greatness of Hitler would eventually make him the ruler of the world." Is there any conceivable reason, security wise, why *some* information could not be given petitioner so he might meet the charge, or was this indeed intended to be, as in

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[18]The Vice-President of the Bishop Trust Co.; the President and General Manager of the Honolulu Star-Bulletin (and later, Hawaii's delegate to Congress); the President and General Manager of the Mutual Telephone Co.; the Assistant Director of the Budget; an attorney and father of one of the Board members.

fact it was, a "sham"? Without disclosing the names of informants, could not appellant have been told that the Board had information to this effect? Could the Board not have told him when, or where he made the "suggestion"? Not even the questions asked by the Recorder throw any light on this matter.

The third and last "finding" of the Board was that "the record of the FBI shows the internee to have been *active* in interests inimical to the United States Government." (Italics added.) If Dr. Zimmerman had been "active", certainly the Board could have given him *some* inkling as to what it had in mind. Certainly the formality of a "hearing" becomes a farce on such a record.

It will be noted that no where in the hearing was petitioner given even an opportunity to say anything. When the last witness was heard and the Board had no questions (they asked none during the whole hearing) the Recorder said "Sentry, take this internee back" [C. T. 149].

The second "hearing" [C. T. 150] "had out of the presence and hearing of the Internee, HANS ZIMMERMAN" emphasizes the complete lack of due process under any circumstance. If the information given by the FBI agent then is an example of the "evidence" previously presented (this information was so confidential that it was given "out of the presence and hearing of" petitioner), it is even more convincing proof of the shabbiness of the whole proceeding.

Soon after petitioner was brought back from the mainland for further incarcertation in Hawaii, petitioner wrote respondent protesting his innocence and requesting respondent to remedy the injustice that was being done him [Ex. O; R. T. 354, 358]. In that letter (set out herein-

after as Appendix G) as well as to one to the Secretary of War [Ex. RR; R. T. 1755] petitioner brought to the attention of respondent that he believed he was the victim of personal revenge of persons who were seeking to eliminate him as a competitor in the medical field. (*Cf.* Justice Douglas, concurring in *Peters v. Hobby,* ..... U. S. ....., 99 L. Ed. (Adv. Op.) 677, 689, referring to unknown charges made by personal enemies and (p. 690) of the evil of the "faceless informers". Certainly here was a case which cried out for respondent to inform petitioner what the case was all about, so that he might disprove whatever the accusations were. The fact, as shown at the trial, that there was no evidence against petitioner does not justify respondent's trampling over petitioner's rights to a fair hearing. Indeed, this fact makes respondent's actions even worse.

Respondent said that the detentions were constantly being reviewed [Dep. 24]. This should mean a review of substance, not of shadow.

After the Battle of Midway in June 1942, we were on the offensive [R. T. 383-385; Resp. Br. below, p. 22]. Surely by then, petitioner could have been given a summary, at least, of what his case was all about.[19] In the Japanese Immigration Case (*Yamataya v. Fisher*), 189 U. S. 86, 100, this court said that: "no person shall be deprived of his liberty without opportunity, *at some time,* to be heard, before such officers, in respect of the matters

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[19]Petitioner was deprived of other ordinary human, and due process, rights. During the two week period before the Board met to "hear" petitioner's case he was held incommunicado and could not even communicate with his wife [R. T. 1645, 1655]; much later letters to his attorney were not forwarded [Ex. U; R. 790]; he was not allowed to consult with his attorney in private [Ex. V; R. T. 795; Ex. Z-1; R. T. 825]; he was not allowed to vote [Ex. YY; R. T. 1773].

upon which that liberty depends." (Italics added.) That "some time" in the case at bar was at least after June, 1942, and certainly before respondent banished and exiled petitioner in March, 1943.[20]

All in all petitioner simply did not get a fair shake. The case demonstrates, because of its failures, the wisdom of John Lord O'Brian's thesis (*National Security and Individual Freedom,* Harv. Univ. Press, 1955, Ch. 2), that even in times of grave emergency, we can have both security and fair play.

Conclusion.

While petitioner is not the father of the Winslow Boy, he has shown the same devotion to liberty. He is not too dissimilar nor far removed from John Wilkes who sued government officers who had overstepped their bounds and whose persistence resulted in the establishment of the fundamental search and seizure right, now embodied in the Fourth Amendment.[21]

Not only during his incarceration, but ever since, has petitioner been trying to obtain vindication. He has been marked as disloyal (*Cf. Wieman v. Updegraff,* 344 U. S. 183, 190, 191; and *cf.* the action of this Court in *Peters v. Hobby,* ..... U. S. ....., 99 L. Ed. (adv.) 677, 688

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[20]When respondent ordered petitioner's release on the mainland in March 1943 (petitioner had 35¢ in his pocket when he arrived [R. T. 1777]), respondent knew that petitioner would not be able to get back to Hawaii because of the priority travel system [R. T. 2046, 2048, 2049]. And petitioner was not allowed to return until after the war, in December, 1945 [Ex. ZZ; R. T. 1779, 1778].

[21]For an account of the *Wilkes* case, see Chaffee, *Free Speech in the United States,* pp. 243-244.

ordering the expunging from the records of the Civil Service Commission the finding that there is reasonable doubt as to petitioner's loyalty.)

Soon after petitioner was allowed to come back to Hawaii he filed the within suit.[22] Not being able to obtain service, petitioner sued in the District of Columbia.[23] Service could not be obtained over respondent there, because the place where he was served, in the Pentagon, was in Virginia. Rather than accept service, respondent filed a motion to dismiss on that ground, which was granted. Believing that respondent resided in West Virginia, petitioner sued there,[24] likewise being unable to obtain service over respondent. Petitioner then sued respondent in California,[25] finally effecting service. But respondent, preferring to stand trial in Hawaii, where he had had the stature of Commanding General and Military Governor, rather than in California, where he was retired, required an agreement that he would appear in the Hawaiian action only if petitioner would give him as-

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[22]In the trial court, respondent made a point on the motion for summary judgment that the Statute of Limitations barred the suit. As the trial court correctly held [R. T. 54], the argument is untenable. Respondent left Hawaii about June 10, 1943 [Emmons Dep. 4] and he was not in Hawaii until he came for the trial of this suit [C. T. 117, 118]. Therefore (Haw. St. §10434) the Statute of Limitations was tolled. Moreover, respondent was in the Army until 1948, long after this suit was filed [Dep. 3, 4). Accordingly, the Soldiers and Sailors Civil Relief Act (50 U. S. C. 555) tolled the running of the statute. And besides, respondent's own General Orders 57 and 133 [C. T. 67, 69] ordered that no such suits as this be brought.

[23]*Zimmerman v. Poindexter*, No. 35366, D.C. D.C.

[24]*Zimmerman v. Emmons*, No. C. A. 449, D.C. S.D. W. Va.

[25]*Zimmerman v. Emmons*, No. 29001 Civ. D.C. N.D. Cal.

surance that in the event of a verdict for petitioner, petitioner would first seek to obtain payment from Congress rather than from respondent's assets [R. T. 530, 534].[26] There was a written agreement to this effect [R. T. 110, 111, 1917]. The trial court refused to allow the jury to consider it [R. T. 2239].

Despite the fact that petitioner was pauperized by respondent's conduct, with the meager earnings of his resuscitated practice, he has engaged in lengthy litigation. Even if he wins, he cannot obtain reimbursement for his costs (Rule 57(5) of this Court) while all of respondent's costs, including lawyers, have been paid for by the Government [Supp. R. T. 14, Rec. Vol. IX]. Nevertheless petitioner persists. He has been seeking this Court's scrutiny for 13 years. He should not be denied now.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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FRED OKRAND,

Attorneys for Petitioner.

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[26]The practice of Congress paying for such judgments or reimbursing, is traditional. See Krasner, *Andrew Jackson, The Gentle Savage, Brentano,* 1929, p. 248; *Ochikubo v. Bonesteel,* 60 Fed. Supp. 916, 926, f.n. 22; *Tracy v. Swartout,* 10 Pet. (U. S.) 80, 98, 99; *Murray v. Schooner Charming Betsy,* 2 Cranch (U. S.) 64, ..., 2 L. Ed. 209, 229.

APPENDIX A.

78 Fed. Supp. 421.

ZIMMERMAN v. POINDEXTER *et al.*

Civ. No. 730.

District Court, Hawaii.

July 3, 1947.

McCORMICK, District Judge.

This is an action for damages claimed by the plaintiff to have been caused by conduct of the respective defendants incidental to the attack and invasion of the Hawaiian Islands by the armed forces of the Empire of Japan on December 7, 1941.

Plaintiff in his second amended complaint avers his loyal citizenship to the United States, and further alleges that all the defendants with the exception of Joseph P. Poindexter and Robert L. Shivers were at all relevant times officers of the Army of the United States; that defendant Poindexter at all material times and until approximately January, 1942, was the duly appointed and acting Governor of the Territory of Hawaii, and that at all times applicable to this action defendant Shivers was a special agent of the Federal Bureau of Investigation in charge of such Governmental agency for the Territory of Hawaii.

It is further alleged that all of the defendants herein acted in all respects as specified in the second amended complaint beyond the scope of their authority and in excess of their authority as officers of the Army of the United States, and as Governor of Hawaii, and as F. B. I. agent respectively; and that they acted arbitrarily, capriciously and unlawfully to the damage of plaintiff in amounts stated in the second amended complaint.

Attack of plaintiff's amended pleading by separate motions to dismiss is made by defendants Poindexter, Kelley, Shivers and Bickness, and by separate motions for summary judgment by defendants Poindexter and Kelley respectively.

Specifically, plaintiff alleges unlawful abrogation on December 7, 1941, by defendant Poindexter of his authority as Governor of Hawaii and the reposing of plenary gubernatorial powers, as well as that normally exercised by judicial officers of the Territory of Hawaii, in the commanding general of the Hawaiian Department of the United States Army.

Various alleged acts of arrest, imprisonment, detention, transportation, denial of the Constitutional, personal and property rights of the plaintiff are specified to have been committed by the defendants from December 7, 1941, to December 16, 1945.

Plaintiff further states that on the mainland he was released by the defendants from further imprisonment on March 12, 1943, and he claims that his reason for delaying the filing of this action is as follows:

"He immediately sought to return to Honolulu. The defendants, however, prevented the plaintiff from returning to Honolulu; and the plaintiff was so prevented by said defendants from returning to Honolulu until December 16, 1945.

"At the first opportunity to return to Hawaii, plaintiff did so; namely, on December 16, 1945; and caused a complaint to be filed in the above entitled action on May 8, 1946.

"The plaintiff was prevented from filing his complaint herein, and from filing a suit against the defendants, from December 8, 1941, to December 16, 1945, by the action

of the defendants as set forth hereinabove and not through any fault on his part."

(1) The right of the plaintiff to invoke the Federal Court for the adjudication of the claims asserted in the pleadings under attack is unquestionable.

(2) Very early in our national life the Supreme Court, speaking through Chief Justice Marshall, enunciated the rule that a case may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either. This rule of decision has quite recently been restated by the Supreme Court in Bell v. Hood, 1945, 327 U. S. 678, 66 S. Ct. 773, 90 L. Ed. 939.

The jurisdiction of this Court in the sense of the power to hear and determine the cause as pleaded in paragraph 3 of the second amended complaint is as follows:

"This court has jurisdiction under the provisions of Title 8, U. S. Code, Section 41 (1) (28 U. S. C. A. 41 (1)) in that the cause of action herein arises under the Constitution of the United States, including more particularly:

"1. The rights of the plaintiff to liberty and property under the Fifth Amendment of the Constitution and laws of the United States;

"2. The rights of the plaintiff under the Sixth Amendment, particularly to a fair and full hearing; to be informed of the nature or cause of any accusation or charge against him; to a presentment or indictment of a grand jury; to a public trial; to a trial by jury; and to be represented by counsel.

"The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars. This proceeding involves the interpretation of 28 U. S. Code,

Section 41 (1) (28 U. S. Code, Section 41 (1) (28 U. S. C. A. 41(1))and the scope of the Fifth and Sixth Amendments."

It is clear that the action pleaded is not one properly classified as a so-called common law tort—or one that is typical of a conflict between state and federal jurisdiction. There are no state courts available to the plaintiff as far as the movant defendants are concerned.

Among the causative factors which must be considered and measured under the allegations of the second amended complaint, in order to decide whether the liability of the respective defendants can or cannot be made out, are two basic Federal laws, namely, Article I, Section 9, of the Constitution pertaining to the suspension of the privilege of the writ of habeas corpus, and the Hawaiian Organic Act, Title 48, U. S. C. A. 491 *et seq.*

These factors, in my opinion, differentiate the pleaded case as laid in the second amended complaint from that considered in the learned opinion of Judge Mathes in Bell v. Hood *et al.*, D.C.S.D. Cal., 71 Fed. Supp. 813.

It could be reasonably contended in the light of the controlling opinion of our Circuit Court of Appeals in Ex parte Zimmerman, 9 Cir., 132 F. 2d 442, that if nothing more than suspension of the privilege of the writ of habeas corpus up to the month of February, 1942, caused damages to the plaintiff, he would have stated no compensable claim. But the case before us, as shown by the record, is not so restricted or circumscribed. See Duncan v. Kahanamoku, 327 U. S. 304, 66 S. Ct. 606, 90 L. Ed. 688. The action before us involves an inquiry into the circumstances and necessities of the situation on December 7, 1941, and subsequent.

(3) It has been held that personal liability attaches to executive or administrative officers who interfere in ways not authorized by law with the rights of citizens. The cloak of office is no protection to such officers even when acting in good faith. See Stiles v. Morse, 233 Mass. 174, 123 N. E. 615, 4 A. L. R. 1365.

(4) It is undoubtedly true that the violation of official duty, as declared by the statute, may be so remote as not to be material, but such situation does not, under the record in this action, apply at this stage of the proceedings. And in order to ascertain the scope or degree of official responsibility and relevant attending consequences, it is necessary that the specific facts and circumstances involved in the concrete situation be examined evidentially.

(5) There are vital issues in this action as to whether or not the statute of limitations of Hawaii as they operate bar the cause against the several movant defendants. There is at least debatable ground as to whether the six-year period provided in Section 10421 or the two-year period under Section 10427 is applicable, and in the light of the tolling terms of Section 10434 of the Revised Laws of Hawaii, 1945, and also because of the existence of situations dehors the statutes which may have operated to suspend the running of the statute of limitations, no sufficient showing appears from the record now before the court which would warrant conclusions that the action is barred against any movant defendant.

(6, 7) It should be noted further respecting the motions of defendants Poindexter and Kelley, respectively, that the question presented by a motion for summary judgment is whether or not there is a genuine issue of fact and not how that issue should be determined. It clearly appears from the record, including affidavits on file herein, that there are genuine issues of fact both as to any

liability on the part of each defendant respectively and also whether or not the factual situation as alleged in the second amended complaint, and shown by the record before us, have not suspended the operation of the statute of limitations of the Territory of Hawaii. And in view of such showing there is no warrant at this time for the granting of the motions for summary judgment herein. Gifford v. Travelers Protective Association, 9 Cir., 153 F. 2d 209; Yoder v. Nu-Enamel Corp., 8 Cir., 1944, 145 F. 2d 420.

We hold that the second amended complaint adequately states a claim for relief against all movant defendants.

It follows that the motion to dismiss the second amended complaint as to defendant Joseph P. Poindexter and the motion for summary judgment in his favor, filed June 24, 1947, is denied *in toto*.

The motion to dismiss the second amended complaint as to the defendant Joseph J. Kelley and motion for summary judgment in his favor, filed June 24, 1947, is denied.

The motion to dismiss the second amended complaint as to the defendant Robert L. Shivers, filed June 24, 1947, is denied.

The motion to dismiss the second amended complaint as to the defendant George W. Bicknell, filed June 24, 1947, is denied.

Each movant defendant will, accordingly, serve and file answer herein without prejudice to the invocation by any defendant of any applicable defense pursuant to the Federal Rules of Civil Procedure, 28 U. S. C. A., following section 723c.

APPENDIX B.

225 F. 2d 97.

United States Court of Appeals for the Ninth Circuit.

Hans Zimmerman, Appellant, vs. Delos C. Emmons, Appellee. No. 13,144. Aug. 1, 1955.

Appeal from the United States District Court for the District of Hawaii.

Before MATHEWS and ORR, Circuit Judges, and DRIVER, District Judge.

MATHEWS, Circuit Judge.

On May 8, 1946, in the United States District Court for the District of Hawaii, appellant, Hans Zimmerman,[1] a citizen of Hawaii, instituted a civil action for damages. On or before June 9, 1947, appellant filed an amended complaint and a second amended complaint. The second amended complaint named 12 defendants, including appellee, Delos C. Emmons, a citizen of California. Appellee was not served with process and did not appear or plead until November 30, 1950, at which time he answered the second amended complaint. Thereafter, on November 30, 1950, appellant moved for a summary judgment. On December 5, 1950, while the motion was pending, a jury trial was commenced. After the jury was impaneled and before any evidence was adduced, the motion was denied. Thereafter, in the course of the trial, appellant filed, and appellee answered, a third amended complaint, which named appellee as the sole defendant[2] and prayed judg-

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[1]See Ex parte Zimmerman, 9 Cir., 132 F. 2d 442; Zimmerman v. Poindexter, D.C. Hawaii, 74 F. Supp. 933, 78 F. Supp. 421.

[2]Thus, in effect, the action was dismissed as to all defendants except appellee.

ment against him for $322,647.42. The jury returned a verdict for appellee, a judgment for appellee was entered thereon, and a motion for a new trial was filed by appellant and was denied. This appeal followed.

Appellant specifies as error the denial of the motion for a summary judgment. There is no merit in this specification. The pleadings, depositions and admissions on file, together with the affidavits, did not, at the time of the filing of the motion or at the time of its denial, show that there was no genuine issue as to any material fact and that appellant was entitled to a judgment as a matter of law. Hence no summary judgment was warranted.[3]

Appellant specifies as error the rejection of evidence to the effect that counsel for appellant and counsel for appellee had agreed (1) that, if appellant obtained a verdict against appellee, appellant would not seek to enforce payment thereof without first seeking such payment from Congress, and (2) that, in consideration of this "assurance," appellee would submit himself to the jurisdiction of the United States District Court for the District of Hawaii. This specification does not, as required by our Rule 18,[4] quote the grounds, if any, urged at the trial for the objection, if any, to the evidence rejected. Hence we

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[3]See Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A.

[4]Paragraph (d) of subdivision 2 of Rule 18 (formerly Rule 20) provides: "* * * When the error alleged is to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected, and refer to the page number in the printed or typewritten transcript where the same may be found. When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial. * * *"

are not required to consider this specification.[5] However, we have considered it and have found no merit in it.

Appellant specifies as error the giving of instructions to the jury and the refusal to give instructions to the jury.[6] These specifications do not, as required by our Rule 18,[7] set out the instructions referred to *totidem verbis*, together with the grounds, if any, of the objections, if any, urged at the trial. Hence we are not required to consider these specifications.[8] However, we have considered them and have found no merit in them.

Appellant specifies as error an alleged communication with the jury. This specification states: "The court erred in communicating with the jury by replying to their note indicating they were deadlocked, out of the presence of counsel, by returning a note saying, 'No comment,' in that the jury had at that time been deliberating fifteen hours, more or less,[9] and the court's refusal to receive the message in open court and to discharge the jury at that time, taken together with the court's instruction about the duty of the jury to agree, amounted to moral coercion of the jury." These statements are not borne out by the record. The notes referred to are not in the record, nor is there

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[5]Ziegler v. United States, 9 Cir., 174 F. 2d 439; DuVerney v. United States, 9 Cir., 181 F. 2d 853; Lii v. United States, 9 Cir., 198 F. 2d 109; Cly v. United States, 9 Cir., 201 F. 2d 806; Gordon v. United States, 9 Cir., 202 F. 2d 596; State of Washington v. United States, 9 Cir., 214 F. 2d 33.

[6]Four specifications relate to instructions given. One relates to instructions refused.

[7]See footnote 4.

[8]Ziegler v. United States, *supra;* Mosca v. United States, 9 Cir., 174 F. 2d 448; DuVerney v. United States, *supra;* Cly v. United States, *supra;* Gordon v. United States, *supra.*

[9]The case was submitted to the jury at 4:05 P. M. on December 21, 1950. The verdict was returned at 5:45 P. M. on December 22, 1950.

in the record any competent evidence that any such notes were sent or received. It does not appear from the record that the court ever refused to receive a message from the jury, or that the jury ever asked to be discharged, or that there was at any time any coercion of the jury.

Appellant contends that the verdict was contrary to and not supported by the evidence. No motion for a directed verdict having been made by appellant, this contention cannot be considered.[10]

Appellant specifies as error the denial of the motion for a new trial. A motion for a new trial is addressed to the trial court's discretion, and the denial of such a motion is reviewable only in case of an abuse of discretion.[11] Here no abuse of discretion is shown.

Judgment affirmed.

(Endorsed:) Opinion. Filed Aug. 1, 1955.

Paul P. O'Brien, Clerk.

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[10]Sharples Separator Co. v. Skinner, 9 Cir., 251 Fed. 25; Harris v. Moreland Motor Truck Co., 9 Cir., 279 Fed. 543; Continental National Bank v. Neville, 9 Cir., 285 Fed. 565; Bank of Italy v. Romeo, 287 Fed. 5; United Verde Copper Co. v. Jaber, 9 Cir., 298 Fed. 97; Steil v. Holland, 9 Cir., 3 F. 2d 776; Southern Pacific Co. v. Johnson, 9 Cir., 8 F. 2d 993; Sacramento Suburban Fruit Lands Co. v. Elm, 9 Cir., 29 F. 2d 233; Swift v. Daly, 9 Cir., 44 F. 2d 40; Equitable Life Assurance Society v. McDonald, 9 Cir., 96 F. 2d 437. See, also, Palmer v. Miller, 8 Cir., 145 F. 2d 926; Traders & General Ins. Co. v. Shoemake, 10 Cir., 199 F. 2d 85; Smith v. Boggia, 2 Cir., 200 F. 2d 604; Irvin Jacobs & Co. v. Fidelity & Deposit Co., 7 Cir., 202 F. 2d 794; Edwards v. Steinns, 4 Cir., 207 F. 2d 734; Funk v. Seaboard Air Line R. Co., 5 Cir., 212 F. 2d 434.

[11]McLeod Lumber Co. v. Western Redwood Co., 9 Cir., 8 F. 2d 930; Allison v. Standard Air Lines, 9 Cir., 65 F. 2d 668; Spokane International Ry. Co. v. United States, 9 Cir., 72 F. 2d 440; Blythe v. Doheny, 9 Cir., 73 F. 2d 799; Bateman v. Donovan, 9 Cir., 131 F. 2d 759; United States v. Bransen, 9 Cir., 142 F. 2d 232; Thiel v. Southern Pacific Co., 9 Cir., 149 F. 2d 783; Brown v. New York Life Ins. Co., 9 Cir., 152 F. 2d 246; Everett v. Southern Pacific Co., 9 Cir., 181 F. 2d 58; Pacific Contact Laboratories v. Solex Laboratories, 9 Cir., 209 F. 2d 529.

APPENDIX C.

132 F. 2d 442.

EX PARTE ZIMMERMAN.

Zimmerman v. Walker, Captain U. S. Army, Asst. Dist. Provost Marshal for Dist. of Hawaii. No. 10093.

Circuit Court of Appeals, Ninth Circuit. Dec. 14, 1942.

HEALY, Circuit Judge.

The appeal is from a judgment of the United States District Court for the Territory of Hawaii denying a petition for a writ of habeas corpus.

Appellant is the wife of Hans Zimmerman. On February 19, 1942, she filed the petition on Zimmerman's behalf alleging that he is unlawfully detained and imprisoned by color of the authority of the United States in the custody of Captain Walker of the United States Army, Assistant Provost Marshal in Honolulu. The petition came on for hearing February 20, at which time the court declined to issue the writ.

The petitioner alleged that both she and Hans Zimmerman are citizens of the United States and residents of Honolulu; that "the cause of pretext" of the detention of Zimmerman "is a certain order or decision made and entered by an alleged Board of Officers and Civilians appointed by the authorities of the United States for the purpose of inquiring into the activities of persons resident within the United States to ascertain whether or not such activities are subversive to the best interests of the United States and as to their loyalty or disloyalty to the United States and to recommend the detention or parole after inquiry, of such persons; and your petitioner is informed and believes and therefore alleges the fact to be that by

virtue of a decision or order of the alleged Board so appointed as aforesaid, the authorities of the United States, acting through the United States Army, are about to remove the interned beyond the jurisdiction of this Honorable Court and to take him to some other place on the Mainland of the United States unknown to your petitioner and to the said interned."

The petition alleged further that the detention is in violation of the constitution of the United States in that there is no legal cause for the removal of the interned from the jurisdiction; that the removal was ordered and the interned held in custody without authority of law in that the interned was denied the right of trial by jury and in that the Board predicated its decision and order "upon statements and testimony of an irrelevant and hearsay nature" taken in the absence of the interned, and that the testimony was wholly insufficient to warrant the Board's decision; that the decision "is null and void in that said Board was not lawfully constituted, appointed and functioning for the purpose of depriving or with authority to deprive citizens of the United States of their constitutional rights of freedom and of being charged, tried and confronted by witnesses without the right to examine or cross-examine said witnesses as to the commission of any acts by such citizens subversive to the United States." There are allegations to the effect that the interned was not permitted to cross-examine witnesses, was denied the right to see reports and statements which had been brought to the attention of the Board, and was permitted "only in a limited and unreasonable manner" to examine witnesses called on his own behalf; that he was without counsel at the hearing and was ad-

vised by Captain Walker that counsel was neither necessary nor desirable, when in fact the hearing was beyond the intelligent comprehension of any lay person.

At the hearing of the petition no evidence was taken and no return required or made. The judge stated that he had read the petition, that in his opinion it "was well grounded and justified the issuance of a writ," but that he felt powerless to direct its issuance in view of Order No. 57 of the military governor,[1] and that "the court is under duress by reason of the order." He closed by stating that the writ was denied "upon the sole ground that the court is forbidden to issue a writ of habeas corpus." Judgment was entered accordingly.

Apart from the reasoning of the judge, we may say at once that in our opinion the denial of the writ was proper. The averments of the petition plus facts of which the court has judicial knowledge required that action.

On the morning of December 7, 1941, the Hawaiian Islands were attacked and invaded by the military and naval forces of Japan.[2] In the forenoon of that day Governor Poindexter of the Territory, acting under authority of Section 5(a) of Act 24 of the Laws of the

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[1]General Orders No. 57 of the military governor were issued January 27, 1942. Among other things, these regulations authorized the limited resumption of the operations of the civil courts in the Territory which had earlier been suspended pursuant to the proclamation of martial law. They continued in force, however, the prohibition of the issuance of the writ of habeas corpus.

[2]See Report of Roberts Commission, page 15, Senate Doc. No. 159, 77th Cong., 2nd Sess.

Special Session of the Territorial legislature of 1941,[3] declared the existence of a defense period throughout the Territory. During the afternoon of the 7th, pursuant to Section 67 of the Hawaiian Organic Act, 48 U. S. C. A. § 532, the governor issued a proclamation placing the Territory under martial law and suspending the privilege of the writ of habeas corpus until further notice.[4] His action in this respect was immediately communicated to and approved by the President.[5]

The Governor's proclamation called upon the commanding general of the Hawaiian Department (General Short) to prevent the invasion and to exercise all powers normally exercised by the civil governor. It further authorized the commanding general "during the present emergency and until the danger of invasion is removed, to exercise the powers normally exercised by judicial officers and employees" of the Territory, and such other

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[3]"Whenever, there exists (1) any state of affairs or circumstances arising out of an invasion, attack, insurrection, rebellion, or lawless violence, or any danger or threat thereof, or (2) any state of affairs or circumstances making it advisable to protect the Territory and its inhabitants, of the existence of any of which the Governor shall be the sole judge, the Governor, by proclamation, may declare a defense period to exist. A defense period may be declared for any one or more counties, or a part of a county, and when once declared shall continue until the Governor, by proclamation, shall declare the defense period at an end. Such proclamations shall be promulgated by publication thereof, or by posting copies of the same in at least ten public places in each county, or part thereof, affected by any such defense period, or, when immediate promulgation is necessary in the opinion of the Governor, who shall be the sole judge thereof, by official announcement thereof by him by means of radio broadcast."

[4]The proclamation declared that the armed forces of Japan "have this day attacked and invaded the shores of the Hawaiian Islands," that "it has become necessary to repel such attack and invasion," and that "the public safety requires" the action taken.

[5]The executive order was published in the Federal Register. As to the effect of such filing as notice, see Sec. 7 of the Federal Register Act of 1935, 44 U. S. C. A. § 307.

powers as the emergency might require. In compliance, General Short at once publicly assumed the position of military governor; and when, ten days later, General Short was relieved of his command, his successor, General Emmons, assumed the post of military governor and by proclamation confirmed the orders and other actions taken by his predecessor. On December 7 the military governor had by General Orders No. 4 established a military commission and provost courts with power to try and determine cases involving offenses committed by civilians against the laws of the United States or of the Territory, or the regulations, orders, or policies of the military. All other courts had thereupon been closed by order of the commanding general. As indicated in note 1 above, the civil courts were later authorized to resume their functions to a limited extent as agencies of the military governor; but otherwise the conditions of martial rule as well as the suspension of the writ continued without interruption.

It is complained that Governor Poindexter entirely abdicated his functions, and there is criticism of the orders, including General Orders No. 57, suspending or continuing in part the suspension of the activities of the civil courts. But questions relating to these matters are not before us and in respect of them we express no opinion. The inquiry here concerns only the legality of the suspension of the privilege of the writ of habeas corpus as related to this petitioner.

The constitution of the United States (Art. 1, Sec. 9, Cl. 2) provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Section 67 of the Act of Congress of April 30, 1900 (the

Organic Act of Hawaii) authorizes the governor "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it," to suspend the privilege of the writ, or to place the Territory under martial law until communication can be had with the President and his decision made known.[6] We note in passing that the constitution of the Republic of Hawaii (Sec. 31) had clothed the president of the Republic with these same powers.[7]

As has been observed, it is history that the Islands were invaded on December 7. Such being the case, Governor Poindexter's suspension "until further notice" of the privilege of the writ, with the approval of the President, was authorized by the constitution and by specific act of congress.[8] The emergency inspiring the proclamation did not terminate with the attack on Pearl Harbor. The courts judicially know that the Islands, in common with the whole Pacific area of the United States, have continued in a state of the gravest emergency;[9] and that

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[6]"The governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse commitatus, or call out the militia of the Territory to prevent or suppress lawless violence invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law until communication can be had with the President and his decision thereon made known." 31 Stat. 153, § 67, 48 U. S. C. A. § 532.

[7]See Archibald King, "The Legality of Martial Law in Hawaii," 30 Cal. Law Rev. 371.

[8]*Ex parte Milligan*, 4 Wall. 2, 125, 126, 18 L. Ed. 281.

[9]Givens v. Zerbst, 255 U. S. 11, 18, 41 S. Ct. 227, 65 L. Ed. 475; United States v. Hamburg-Amerikanische, etc., Co., 239 U. S. 466, 475, 36 S. Ct. 212, 60 L. Ed. 387; Hamilton v. Dillin, 21 Wall. 73, 88 U. S. 73, 90, 22 L. Ed. 528.

the imminent threat of a resumption of the invasion persisted. In the months following the 7th of December the mainland of the Pacific coast was subjected to attacks from the sea. Certain of the Aleutian Islands were invaded and occupied. And as late as the early summer of 1942 formidable air and naval force of Japan were turned back at Midway from an enterprise which appeared to have Hawaii as its ultimate objective.

But it is contended that the writ should have been issued and the respondent required to set forth in a return the military necessity for the action taken in order to establish the proper procedural basis for a decision. Counsel argue that while the privilege of the writ may be suspended in appropriate circumstances, the writ itself may not. They rely in this respect on language of the court in Ex parte Milligan, 4 Wall. 2, 130, 131, 18 L. Ed. 281, to the effect that "the suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it."

It is little to the purpose to attempt here an analysis of distinctions between suspension of the privilege and suspension of the writ. Whether the writ will be awarded in any particular case depends on the showing made. The statute, 28 U. S. C. A. § 455, provides that the writ shall be awarded "unless it appears from the petition itself that the party is not entitled thereto." And see Walker v. Johnston, 312 U. S. 275, 283, 284, 61 S. Ct. 574, 85 L. Ed. 830; United States *ex rel.* Quirin v. Cox, October 29, 1942, 63 S. Ct. 2, 87 L. Ed. ..... The

writ ought not to be awarded if the court, upon examination of the petition, is satisfied that the petitioner would be remanded to custody. *Ex parte* Watkins, 3 Pet. 193, 201, 7 L. Ed. 650. In this case the petition and facts of which the court was required to take judicial cognizance were together to be considered as constituting the application, Walker v. Johnston, *supra,* 312 U. S. page 284, 61 S. Ct. 574, 85 L. Ed. 830.

It was not made to appear in the petition that Zimmerman had been charged with any crime or that sentence had been imposed upon him; rather, that he was being held or detained by the military authorities. The cause of his detention was alleged to be a decision of a Board of officers and civilians appointed by the authorities of the United States to recommend the detention or parole of persons resident within the United States, after inquiry to ascertain whether their activities are subversive to the best interests of the United States and whether they are loyal or disloyal. The petition did not assert that the actual cause of the detention was unrelated to such an inquiry, or that the inquiry was undertaken or the decision made in bad faith, or that the authority of the Board was used to bring about the detention of the petitioner as a means of furthering private interest or personal spite. Had a showing of such sinister nature been made it appears to us that the respondent ought to have been required to show cause for the detention in order that the court might be in position to determine whether the action was purely arbitrary, Sterling v. Constantin, 287 U. S. 378, 401, 53 S. Ct. 190, 77 L. Ed. 375. But taken by its four corners the petition discloses that Zimmerman was being subjected to detention by the military authorities after an inquiry related in some way to the

public safety, in an area where martial law was in force and the privilege of the writ had been lawfully suspended. The futility of further inquiry was apparent on the face of the petition.

The allegations that Zimmerman had been denied his constitutional right of trial by jury, of being confronted with the witnesses against him, and of having counsel to represent him, were purely argumentative and are without force. They tendered no material issue of fact.[10] The same is true of the allegation that the Board was not lawfully constituted "for the purpose of depriving or with authority to deprive citizens of the United States of their constitutional rights," etc. This is not an averment that the Board was not regularly constituted for the purpose for which, as shown elsewhere in the petition, it had been set up by the military, namely, to recommend, after inquiry, the detention or parole of suspected persons. It is true that the averments of petitions for this great writ are not scrutinized with technical nicety; but neither are they taken as importing something other than what they say. The courts, in circumstances like the present, ought to be careful to avoid idle or captious interference.

The petition, then, was to be considered in its setting, and its sufficiency gauged in the light of the unprecedented conditions under which present day warfare is waged. It is common knowledge that the Hawaiian Islands, owing to their position and the inclusion in their population of so large an element presumptively alien in sympathy, are peculiarly exposed to fifth-column activities. In such an exigency, a prime purpose of the suspension of the writ

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[10] *Ex parte* Cuddy, 131 U. S. 280, 9 S. Ct. 703, 33 L. Ed. 154; Craemer v. State, 168 U. S. 124, 18 S. Ct. 1, 42 L. Ed. 407.

is to enable the executive, as a precautionary measure, to detain without interference persons suspected of harboring designs harmful to the public safety.

The civil courts are ill adapted to cope with an emergency of this kind. As a rule they proceed only upon formal charges. Their province is to determine questions of guilt or innocence of crimes already committed. In this respect their functions are punitive, not preventive; whereas the purpose of the detention of suspected persons in critical military areas in time of war is to forestall injury and to prevent the commission of acts helpful to the enemy. It is settled that the detention by the military authorities of persons engaged in disloyal conduct or suspected of disloyalty is lawful in areas where conditions warranting martial rule prevail.[11] Measures like these are essential at times if our national life is to be preserved. Where taken in the genuine interest of the public safety they are not without, but within, the framework of the constitution.

Affirmed.

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[11] *Ex parte* Milligan, *supra*, 4 Wall. page 125, 18 L. Ed. 281; Moyer v. Peabody, 212 U. S. 78, 84, 85, 29 S. Ct. 235, 53 L. Ed. 410. Consult Fairman, The Law of Martial Rule and the National Emergency, Harvard Law Rev. Vol. LV, No. 8, page 1253.

HANEY, Circuit Judge (dissenting).

Since this case involves a conflict regarding the respective spheres of authority of the civil and military officers, it is necessary to consider various subjects in the determination thereof.

Suspension of Civil Laws. The English Bill of Rights, December 16, 1689, declared:

"1. That the pretended Power of suspending Laws, or the Execution of Laws, by regal authority, without consent of Parliament, is illegal.

"2. That the pretended Power of dispensing with Laws, or the execution of Laws, by regal Authority, as it hath been assumed and exercised of late, is illegal * * *."

The Declaration of Independence, July 4, 1776, indicted the King—"For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Government: For suspending our own Legislature, and declaring themselves invested with Power to legislate for us in all cases whatsoever. * * *"

In view of the abuses well known in the colonies, it is not surprising that prohibition against their recurrence found their way in the state constitutions adopted prior to the federal constitution. Of the thirteen original states, Connecticut and Rhode Island had no constitutions. Of the remaining eleven, Maryland, Massachusetts, New Hampshire, North Carolina, and Virginia expressly prohibited suspension of the laws by anyone but the legislature. Vermont in its constitution of 1786 had a like

prohibition. It was probably impliedly included in the other constitutions.

As a result of the previous history it was only natural that the question should receive treatment in the Constitution. Article 1, Section 1, provides that "all legislative Powers herein granted shall be vested in a Congress of the United States * * *." The action of suspending a law being a legislative power, a law can be suspended only by Congress or pursuant to its authority.

Authority Over the Army. In early times, the army was an arm of the King under the latter's exclusive control, excepting in cases of mutiny. In paragraph VI of the Petition of Right, June 7, 1628, it was complained that "great Companies of Soldiers and Mariners have been dispersed into divers Counties of the Realm * * * against the Laws and Customs of this Realm." The English Bill of Rights, December 16, 1689, declared "That the raising or keeping a Standing Army within the Kingdom in Time of Peace, unless it be with Consent of Parliament is against Law."

In the Constitutions of the original states, seven contained express provisions to the effect that the military was under subordination to the civil power. All such provisions were similar to the one in the Maryland Constitution (1776), "That in all cases, and at all times, the military ought to be under strict subordination to and control of the civil power." Declaration of Rights § 27. The Delaware, Georgia, New Jersey and New York Constitutions had no express provisions. In addition to the other seven constitutions, the Vermont Constitution (1793) also had the subordinating provision. Part 1, art. 16.

The Constitution empowered Congress "To raise and support Armies" and "To make Rules for the Government and Regulation of the land and naval Forces." Article 1, § 8, cls. 12, 14. There can be little question but that the army is subordinate to the law. Dow v. Johnson, 100 U. S. 158, 169, 25 L. Ed. 632; Davis, A Treatise on the Military Law of The United States (3rd Ed. Rev.) 325.

Martial Law. It is the view of some, that the army, by a declaration of martial law, could by that simple expedient, deprive all people under its control of all liberties, whether personal or inalienable, or not. That view grows out of a conclusion of terms and meaning brought about by modern writers. Winthrop's, Military Law and Precedents (2nd Ed.), 1274; Corwin, Martial Law, Yesterday and Today (1932), 47 Pol. Sc. Quart. 95; Fairman, The Law of Martial Rule and The National Emergency (1942), 55 Harv. L. Rev. 1253, 1257-1259. To be understandable at all, its history must be traced.

For its meaning at the time the Constitution was adopted, 14 Encyc. Britannica (14th Ed.) 984, states as follows:

"Much of the confusion and doubt about its meaning and the powers exercisable in its name would have been avoided if modern writers had been careful to confine the term to its original meaning as used by Hale and Coke, namely, the law applied to the army and nothing else, the law known as 'military law.' Modern writers have appropriated the term 'Martial Law' to the assumption or arbitrary powers by the Executive, in time of civil disturbances, over civilians, and have then proceeded to read earlier authorities by the light of its rays. The

result is to darken their counsel and beget a gross anachronism. Hale (History of the Common Law, pp. 36-42) says of martial laws that 'the necessity of good order and discipline in the army is that only which can give these laws countenance.' He accordingly held that it could not apply to civilians in any circumstances.

"The term was used in the same sense as Hale uses it in the famous Petition of Right, which forbade martial law in time of peace. The 'Petition' did not thereby, either expressly or impliedly, legalize it in time of war. The contemporary debates in the House of Commons show that the men of those days did not contemplate the legality of martial law as applied to civilians, under any circumstances. In objecting to martial law they were objecting to commissions issued by the king to try civilians as though they were soldiers subject to military law and triable by court martial. As for soldiers themselves, the contemporary view was that at common law, even they were not, in time of peace, subject to martial law, *i. e.*, to military law, except by a statute (a view which now finds countenance in the necessity of the annual Army Act), although in the field, in time of war, they were so subject. Or to put it another way, martial law was pure military law, and as such unknown to the common law, and only came into existence with the outbreak of war and even then was confined to troops.

"Cockburn, C. J., was unquestionably right in holding (see his observations in the Queen v. Nelson, Finlasson's edition, p. 66) that the Petition of Right condemned the exercise of martial law against the subject 'under any circumstances,' whether in 'war' or in 'peace', and even as against soldiers except in the case of armies in time of war. The promoters of the Petition of Right were

solely concerned to assert the supremacy of the common law. Even a rebel, they argued, taken with arms in his hands, had a right to be tried by the ordinary common law courts. If he could not be so tried, the law was then altogether suspended. They did not trouble themselves with the question with which modern lawyers are so greatly vexed, namely, as to whether there could exist a kind of qualified 'state of war' under which the courts might still be sitting, but in circumstances of military indulgence such as would bind them not to interfere. This modern view has helped to give a colour of legality to martial law which would have been incomprehensible to the Stuart generation, denying as they did, the very existence of the thing except within the determinate limits of military law."

That such was the view in the colonies is borne out by various state constitutions adopted prior to the Constitution. Thus the Maryland Constitution (1776) provided: "XXIX. That no person, except regular soldiers, mariners, and marines in the service of this State, or militia, when in actual service, ought in any case to be subject to or punishable by martial law." Declaration of Rights, § 29. Vermont had a similar provision. Const. 1786, c. 1, art. 19. Massachusetts and New Hampshire had similar provisions except that at the end of the provision quoted, there was added "but by authority of the legislature". Const. Mass. 1780, Pt. 1, art. 28; Const. N. H. 1784, Pt. 1, art. 34.

The kind of martial law then known was what we now refer to as "military law" and was expressly recognized by Article 1, Section 8 of the Constitution which authorizes Congress "To make Rules for the Government and Regulation of the land and naval Forces", Clause 14 (such provision being taken from Art. IX, Articles of Confedera-

tion, 2 Farrand, Records of the Federal Convention 330) and "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States." Clause 16. The Articles of War, 10 U. S. C. A. § 1471, *et seq.*, were the statutory exercise of these powers.

Military Government. As can be seen "martial law" meant, when the Constitution was adopted, "military law". Subsequently, it began to be used synonymously with "military government." For example, see 1 Cooley's Blackstone 349, n. 3. Davis, *supra,* 304, n. 1, explains military government as follows: "Martial law is a modified degree of the law of war, or a law assimilated to the latter, called into exercise temporarily and for a specific purpose, at a time of war or public emergency, and generally in a place or region not constituting enemy's country, or under permanent military government. Whether proclaimed by the President or declared by a competent military commander, martial law overrides and supersedes, for the time being, all civil law and authority, except in so far as the same may be left operative by the terms of the announcement, or the action or acquiescence of the dominant power. While the status of martial law continues, the military power, instead of being subordinate, is superior to the civil power, and the natural and normal condition of things is reversed * * *."

It is more tersely described in 14 Encyc. Britannica (14th Ed.) 984, as follows: "The truth of the matter is that the term martial law is really an anachronism and legally means nothing at all. Martial law is simply, as Fitzjames Stephen put it, 'the assumption by the officers of the Crown of absolute power exercised by military force

for the suppression of an insurrection and the restoration of order and lawful authority.' * * *"

In reading the authorities, care should be taken to determine in what sense "martial law" is used.

Military government is not expressly recognized in the Constitution and is wholly and entirely contrary to the form of government provided for therein. Davis, *supra,* 305. "Martial law is not provided for in the U. S. Constitution, except by inference, but is rather a means of preserving the Constitution. It is the law of necessity and asserts itself." 14 Encyc. Britannica, 14th Ed., 986. See also: Davis, *supra,* 304; Winthrop, *supra,* 1279; Corwin, *supra,* 97; Underhill, Jurisdiction of Military Tribunals in The United States over Civilians (1924), 12 Cal. L. Rev. 75, 159, 177-178. "A mere 'proclamation' of martial law by the Crown has, of itself, no legal validity whatsoever. A Proclamation is not necessary to justify resort to martial law nor is the resort to martial law justified by it." 14 Brit., *supra,* 985. See also: Davis, *supra,* 304; Corwin, *supra,* 97; Underhill, *supra,* 172. Probably the only legal effect of such a proclamation is psychological. Government by a commanding officer is of course not government by executive, legislative and judicial branches, the kind of government provided for in the Constitution.

In considering the extent to which military government is recognized here, since the army is an arm of the executive, we may refer, first to executive powers. Art. II, Sec. 2, provides that "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Art. II, Sec. 3

provides that the President "shall take Care that the Laws be faithfully executed." Nothing in those provisions expressly authorizes the President to impose military government anywhere. Winthrop, *supra,* 1294.

Respecting the legislative powers, there are several provisions having a bearing on the question. Art. I, Sec. 8, provides, among other things:

"The Congress shall have Power To Lay and Collect Taxes, Duties, Imposts and Excises, to * * * provide for the common Defense and general Welfare of the United States * * *

"To declare war * * *;

"To raise and support Armies * * *;

"To provide and maintain a Navy * * *;

"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions * * *;

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof."

None of these provisions authorizes Congress to establish a military government anywhere.

One of the provisions does authorize Congress to provide for calling forth the Militia to (1) "execute the Laws of the Union"; (2) "supress Insurrections"; and (3) "repel Invasions". Examples of the exercise of this power may be found in 18 U. S. C. A. §26; 32 U. S. C. A. §81a; and 50 U. S. C. A. §§201, 202. However, calling forth the militia, and the imposition of a military government

are two different things. The former finds express sanction in the Constitution—the latter none. The conclusion is clear from the history of the times and the then prevailing view of the people as previously herein shown. In view of the long struggle to obtain recognition of the right of the people to govern, it is inconceivable that they would have given up the struggle after they had been successful in compelling recognition of the principle.

However, from the provisions of the Constitution and Art. IV, Sec. 4 which provides that the United States "shall protect each of them [*i. e.* the states] against Invasion" several inferences may be made. The first is that since Congress is expressly authorized to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" the militia, when called for one of such purposes, has power to do all that is necessary to accomplish those purposes. If the situation is such that the civil government cannot function, the army rules until such government can be restored. Once the situation returns to normalcy to the extent that civil government can function, military rule or government vanishes and ceases to exist Ex parte Milligan, 4 Wall. 2, 71 U. S. 2, 121, 18 L. Ed. 281. Davis, *supra,* 305; Winthrop, *supra,* 1280. The argument that what was said in that case is dicta, is wholly unsound, because the government expressly argued that Milligan could be detained regardless of whether an act of Congress authorized it or not. (Pp. 21, 92.) See also: 1 Cooley's Blackstone, 350-351, n. 1.

Therefore, military government is not established by merely proclaiming it. It comes into being and exists solely by reason of the fact that strife prevents operation of the civil government. Ex parte Milligan, *supra,* 4

Wall. 127, 18 L. Ed. 281, where it is said: "As necessity creates the rule, so it limits its duration." In other words, whether military government prevails is a question of fact depending on the existence of facts in the territory where it is supposed to be controlling, and a proclamation of the military that it exists is superfluous and ineffective.

Where the military asserts a right to exercise some powers of government, usually in the form of restrictions, and do not approach a complete military government, the right, if it exists at all, comes from the right to do all that is necessary "to execute the Laws of the Union, suppress Insurrections and repel Invasions" and to protect each of the states "against Invasion". Compare: Winthrop, *supra,* 1275. Whether a particular action is "necessary" is a question of fact to be determined from proof of, among other things, the reason for the restriction, its purpose, and the improvement of methods and engines of war. What was not necessary a century ago, may be necessary today.

Functioning of the Courts. From what has been said it can be readily seen that the military have no authority to close any particular branch of government. If they had, it would be simple for a tyrannical executive to declare martial law, and then under a pretext of necessity, take in custody, the members of Congress, as well as the courts, thus effectually abolishing the Constitution. While the turbulence of conditions may prevent the legislative and judicial branches from operating, it is only such conditions which prevent such branches from operating, and not a rule or order of the military, which has no power to accomplish this effect.

The historical view shown in 14 Encyc. Britannica (14th Ed.) 984, still exists: "The 17th century view as

to the position of the ordinary courts was clear and unequivocal. It was that if the civilian situation was such that the courts were able to sit at all, the judges were free to examine every arbitrary act of the military on its merits. If the civil situation was so 'warlike'—the term 'war', in connection with martial law, does not mean war in the international sense, but war in the sense of rebellion or civil strife, as in the Statute of Treasons where it is declared to be treason for a subject to 'levy war' against the king in his realm—that the courts could not sit, the king's writ did not run, and the sheriffs and ministers of justice could not levy execution, then such facts constituted a state of war. (Cf. Coke, Institutes I., 249b.) But the existence of such facts must be proved to the satisfaction of the courts, if and when they were able to sit. The courts could thus, either at the time or after, decide whether the military measures taken to suppress the civilian commotion exceeded the necessity of the case, in precisely the same way as the courts always decide how far civilians and police are justified in using force to encounter and suppress force * * *."

Habeas Corpus. The writ of habeas corpus originated as "a writ by which the superior courts of the common law and the chancellor sought to extend their jurisdiction at the expense of inferior or rival courts" and "ultimately took form and survived as the writ of habeas corpus ad subjiciendum, by which the legality of the detention of one in the custody of another could be tested judicially. See Holdsworth, History of the English Law, Vol. 9, 108-125. Its use was defined and regulated by the Habeas Corpus Act of 1679, 31 Car. II, C. 2. * * *." McNally v. Hill, 293 U. S. 131, 136, 55 S. Ct. 24, 79 L. Ed. 238.

The Constitution of Massachusetts (1780) contained the following provision: "The privilege and benefit of the writ of habeas corpus shall be enjoyed in this commonwealth, in the most free, easy, cheap, expeditious, and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve months." Part 2, c. 6, art. 7. The Constitution of New Hampshire (1784) contained a provision almost identical, except that the time limit was stated to be "three" months. Part 2, art. 91. The other state constitutions contain no express reference to the writ except that of Georgia which incorporated the principles of the habeas corpus act.

On August 20, 1787, there was introduced before the Federal Convention by Pinckney of South Caroline a resolution identical to the provision in the Massachusetts Constitution, except that the time limit was left blank. It was referred to the Committee of Detail. 2 Farrand, Records of the Federal Convention 334, 340, 342. Madison's notes, after stating that Pinckney urged the propriety of securing the benefit of habeas corpus, contains the following:

"Mr. Rutlidge [of South Caroline] was for declaring the Habeas Corpus inviolable—he did not conceive that a suspension could ever be necessary at the same time through all the States—

"Mr. Govr Morris [of Pennslyvania] moved that 'The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it.'

"Mr. Wilson [of Pennsylvania] doubted whether in any case a suspension could be necesssary, as the discretion now exists with Judges, in most important cases to keep in Gaol or admit to Bail."

The vote for the resolution discloses that the first part of the resolution to the word "unless" was adopted unanimously, while the remainder was adopted by a vote of 7 to 3. 2 Farrand, *supra,* 438. The word "where" was changed to "when" by the Committee of Style. 2 Farrand, *supra,* 596—compare p. 576.

McHenry reporting to the Maryland House of Delegates on November 29, 1787, made the statement: "Public Safety may require a suspension of the Ha: Corpus in cases of necessity." Luther Martin of Maryland opposing adoption of the Constitution, several times stated that too much power was being given to the federal government over which the states could exercise complete control in cases of "necessity". 3 Farrand, *supra,* 157, 213.

The provision of the Constitution as adopted is: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Article 1, §9, cl. 2. The provision itself does not authorize any particular branch or individual to suspend the privilege of the writ. It impliedly authorizes suspension of the privilege of the writ when "in Cases of Rebellion or Invasion the public Safety may require it", but in such cases, only the "privilege" of the writ is suspended and not the writ itself.

In Ex parte Milligan, *supra,* 4 Wall. 130, 131, 18 L. Ed. 281, it is said: "* * * The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it." The "privilege" meant by the Constitutional provision is not the right to obtain a writ, but the right to be discharged from custody by a habeas corpus

proceeding. The judicial powers lodged in the courts by the Constitution cannot be taken away by either the executive or legislative branches of the government, anymore than the judicial branch can take away the powers of the other two. This, of course, means that the military have no more power to deprive a person of the privilege of the writ of habeas corpus than it has to suspend any other law or judicial power, as considered above.

Where a person is taken into custody by the military, he may obtain a writ of habeas corpus, and the court then decides the question as to whether or not the situation is one where "in Cases of Rebellion or Invasion the public Safety may require" that the petitioner be retained in custody. In my opinion, this simply means that the Constitution itself suspends the right to be released when it is shown that the action taken by the military is reasonably necessary for it "to execute the Laws of the Union, suppress Insurrections and repel Invasions" and to protect each of the states "against invasion". In other words, it is not a case where any branch of the government may suspend anything, but one which the Constitution itself provides the rule of suspension to all cases where the courts have made the appropriate finding. If the courts find that the action of the military is reasonably necessary to accomplish one of the four purposes mentioned above, then the case is ended because the Constitution prohibits further action by the courts, but if the court makes a contrary finding, it has the Constitutional duty to carry out its function to declare the military action ineffective.

While extensive authorities need not be cited, two will be referred to. In Ex parte Milligan, *supra*, an act of Congress authorized the President to suspend the privilege of the writ of habeas corpus. The President did suspend

it. The suspension was ineffective to prevent consideration of the case which was a habeas corpus proceeding. In United States ex rel. Quirin v. Cox, October 29, 1942, 63 S. Ct. 2, 9, 87 L. Ed. ....., a presidential proclamation prohibited access to the courts by petitioners. The proclamation was ineffective to prevent consideration of the cases which were habeas corpus proceedings, the court saying: "And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."

Extent of Application of Rules. The above applies to citizens of the United States within the territorial limits of the United States, but not to such citizens who are subject to the law of war or the articles of war. Whether aliens not subject to the law of war or articles of war are governed by the same rules I do not discuss.

Appellant was taken into custody in a territory belonging to the United States, but which is not one of the United States. Although a citizen he subjected himself to the rules applicable to that territory upon entering the same. Art. IV, Sec. 3, cl. 2, of the Constitution provides in part: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *." It could be, but is not, argued that when Congress incorporated the Territory of Hawaii, it did so subject to the limitations expressed in the Organic Act, 48 U. S. C. A., §532, that the governor of such territory might "suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law" and that such limitations expressly

authorized a military government pursuant to the quoted Constitutional power. However, since no argument is made upon that precise point, and since it is assumed that a citizen's rights in the Territory of Hawaii are the same as those of a citizen in the United States, I have considered the case on that basis. See Murphy v. Ramsey, 114 U. S. 15, 5 S. Ct. 747, 29 L. Ed. 47; compare: Scott v. Sandford, 60 U. S. 393, 19 How. 393, 15 L. Ed. 691; Downes v. Bidwell, 182 U. S. 244, 21 S. Ct. 770, 45 L. Ed. 1088.

The Instant Case. The petition before us contains no allegation that the action of the military in detaining Zimmerman exceeded what was reasonably necessary. There is, however, the following allegation: "* * * that said Board, so purporting to act as aforesaid, and its order and decision in the premises, is null and void in that said Board was not and is not lawfully constituted, appointed and functioning for the purpose of depriving or with authority to deprive citizens of the United States of their constitutional rights of freedom and of being charged, tried and confronted by witnesses without the right to examine or cross-examine said witnesses as to the commission of any acts by such citizens subversive to the United States of America."

The petition does not show that Zimmerman was charged with or accused of violating the Constitution, a statute of the United States, a statute of the Territory of Hawaii, the Articles of War, the Law of War, any order of the President, the Secretary of War, the Military Governor or any other commanding officer. It was admitted on oral argument by appellee that no such violations were charged against Zimmerman. While the petition does allege that the cause or pretext of Zimmerman's

detention was a certain order or decision made and entered by an alleged board of officers and civilians "appointed by the authorities of the United States," it nowhere appears who such authorities were. There is no more reason for assuming that such authorities were officers of the army than it was any other officer of the United States.

Rule 8(f), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, require that "All pleadings shall be so construed as to do substantial justice." *Ex parte* Burrus, 136 U. S. 586, 591, 10 S. Ct. 850, 852, 34 L. Ed. 500 states: "It is true that perhaps the court or judge who is asked to issue such a writ need not be very critical in looking into the petition or application for very clear grounds of the exercise of this jurisdiction, because, when the prisoner is brought before the court or justice or judge his power to make full inquiry into the cause of commitment or detention will enable him to correct any errors or defects in the petition under which the writ issued." In Holiday v. Johnston, 313 U. S. 342, 350, 550, 61 S. Ct. 1015, 1017, 85 L. Ed. 1392, it is said: "A petition for habeas corpus ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice."

I think the quoted allegation is sufficient to raise the question of fact as to whether or not the Board was lawfully constituted, *i.e.*, whether or not this particular Board was actually appointed in accordance with the orders of the so-called military governor. I think it also sufficient to challenge the power and authority of the Board, a question which may be tried by habeas corpus proceedings. McClaughry v. Deming, 186 U. S. 49, 51, 22 S. Ct. 786, 46 L. Ed. 1049.

Since the petition alleged grounds for the writ, in accordance with the rules previously mentioned, the proclamations attempting to suspend the privilege of the writ of habeas corpus, and to declare martial law—meaning military government—are wholly ineffectual to prevent the inquiry, and the court below erred in holding that he was prevented from issuing such writ because of such proclamations.

The question remains as to whether or not the writ should have issued. Since the allegations in the petition are inconclusive, I think the court below should have issued a writ, or preferably an order to show cause. After the return to the show cause order, and any traverse thereof are filed, the court can then determine whether there is an issue of fact to be tried. If such an issue is present, the writ must issue, and a hearing had. Walker v. Johnston, 312 U. S. 275, 284, 61 S. Ct. 574, 85 L. Ed. 830. The petition and the traverse to the return may be treated together as the application for the writ. *Id.*

If, from such application, it appears that Zimmerman is held by the military within the authority granted by the so-called military governor, and that Zimmerman asserts that such action was not reasonably necessary for the military in order "to execute the Laws of the Union, suppress Insurrections and repel Invasions" and to protect each of the states "against invasion," then a writ of habeas corpus should issue and the fact, as to whether Zimmerman's detenton was "reasonably necessary" for the purposes mentioned, should be determined. If the court below finds the action of the military was "reasonably necessary" for such purposes, then it can proceed no further. If it finds such action not to be "reasonably necessary" it must order Zimmerman's release.

For these reasons, I dissent.

APPENDIX D.

319 U. S. 744.

No. 823.

ZIMMERMAN v. WALKER.

May 3, 1943.

Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied on the ground that the cause is moot, it appearing that Hans Zimmerman, on whose behalf the petition is filed, has been released from the respondent's custody. Weber v. Squier, 315 U. S. 810; Tornello v. Hudspeth, 318 U. S. 792.

APPENDIX E.

UNITED STATES SUPREME COURT.

No. 823.

October Term, 1942.

CLARA ZIMMERMAN, Petitioner

v.

E. E. WALKER, Captain, United States Army, etc.

PETITIONER'S REPLY TO GOVERNMENT'S MEMORANDUM SUGGESTING THAT THE ABOVE-ENTITLED CASE HAS BECOME MOOT.

The petitioner objects to the dismissal of the Petition for the Writ of Certiorari on file herein, upon the grounds set forth in the Government's memorandum suggesting that the above-entitled cause has become moot.

The petitioner will rely upon the affidavit of Hans Zimmerman submitted herewith.

The petitioner and her counsel deem it appropriate and desirable that the facts pertaining to, and the circumstances surrounding, the release of Hans Zimmerman, be called to the attention of this Court before the Court takes any action pertaining to the Government's present purpose to secure a dismissal of the petition.

C. F. PARSONS, Attorney for Petitioner.

AFFIDAVIT OF DR. HANS ZIMMERMAN IN OPPOSITION TO DISMISSAL OF PETITION FOR WRIT OF CERTIORARI.

State of California, County of Los Angeles—ss.

Hans Zimmerman, being first duly sworn, deposes and says: That he is now on the mainland of the United States, and is the person in whose behalf Clara Zimmerman, petitioner herein, originally filed a petition for writ of Habeas Corpus in the District Court of the United States for the District and Territory of Hawaii, on February 19, 1942, and in whose behalf the said Clara Zimmerman has filed and is prosecuting the petition for writ of certiorari in this Court. On March 12, 1943, the affiant was released from military custody at San Francisco, California. On March 11, 1943, the petition for writ of certiorari herein was filed with the Clerk of this Court.

On or about March 8 or 9, 1943, the United States Department of Justice had been formally advised by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, of said prospective filing of said petition.

Some time prior to said March 8th or 9th, and as the petitioner is informed and believes, and therefore alleges, sometime subsequent to December 14, 1942, representatives of said Department of Justice had been advised that a petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Ninth Circuit affirming the judgment of the District Court of Hawaii, would be filed with this Court.

The affiant is informed and believes and therefore alleges that the sole reason for the release of affiant at the time and under the circumstances indicated aforesaid, was in order to prevent this Court from determining the merits of the cause of the petitioner and from adjudicating the legality of martial law and the suspension of the writ of Habeas Corpus in the Hawaiian Islands, as applied to the affiant.

The facts and circumstances supporting the affiant's beliefs, are:

On February 19, 1942, the petitioner, in behalf of the affiant, caused to be filed with the United States District Court for the District Court for the District and Territory of Hawaii, a petition for writ of Habeas Corpus, and on said 19th day of February, 1942, there was served upon the United States Attorney for the District and Territory of Hawaii, a notice that said application for the writ would be heard the following day, February 20, 1942.

Thereupon, and on said February 20, 1942, the affiant, without any reason being given to him, and as the affiant is informed and therefore alleges, in order to remove and secrete the affiant from the jurisdiction of the said District Court, was, against his will and consent, taken by the military authorities from said Hawaiian Islands to the mainland of the United States, and brought to and imprisoned at Camp McCoy, Wisconsin, the affiant arriving at said Camp McCoy on March 9, 1942. Sometime subsequent to said March 9, 1942, and prior to on or about April 14, 1942, the military authorities were advised that counsel for the American Civil Liberties Union was planning to institute Habeas Corpus proceedings in behalf of the affiant in the Federal District Court

of Wisconsin, within the jurisdiction of which said Camp McCoy is located, in order to challenge the legality of the affiant's internment.

Thereupon, and on or about said April 14, 1942, the affiant again without being advised as to the cause thereof, and against his will and consent, was removed by the military authorities from Camp McCoy, Wisconsin, back to the Hawaiian Islands, and continued to be imprisoned thereat.

On the occasion of the affiant's release from military custody aforesaid, the affiant was requested by a military officer to sign and execute a document purporting to be a release by the affiant of the military authorities, of any liability which said military authorities might have towards the affiant in connection with his imprisonment aforesaid; the affiant was advised that if he would sign such a statement, he would not be interned again; that if he signed it he could go off the boat which had transported the affiant from the Hawaiian Islands to San Francisco, a free man, but if he did not sign it, said military officer advised him that he (said military officer) did not know what would happen to the affiant.

The affiant refused however to sign said document.

Signed, "Hans Zimmerman."

Subscribed and sworn to before me this 21st day of April, 1943.

(Seal) Helen Wirin.

Notary Public in and for said Country, State, and County.

APPENDIX F.

Extracts from documents relating to the release of petitioners in 1943:

[C. T. 131; R. T. 309; Ex. F; Dec. 24, 1942]:

"Concerning Zimmerman comma since the decision in his case is so favorable suggests that consideration be given to paroling him either in Hawaii or mainland stop It is not repeat not known whether he will take an appeal but parol prior to appeal would be more effective than after."

Signed, "Cramer."

[C. T. 130; R. 311; Ex. G; Dec. 27, 1942]:

"Parole of Zimmerman not advisable at this time as Department Commander feels that if he were paroled now the inference would be that he was merely being held for the purpose of perfecting a legal position on the matter and in any event if appeal is made to Supreme Court no doubt it will confirm Circuit Court decision."

[C. T. 134; R. 702; Ex. S]:

"SUBJECT: Release of Zimmerman, internee.

"11 Feb. 43. O.M.G. to Contact Office."

"1. It has been decided to release Zimmerman from internment effective upon his arrival on the mainland. It is desired that you make the necessary arrangement for his evacuation as soon as practicable.

"THOMAS H. GREEN, Brigadier General, A. U. S. Executive."

[C. T. 120; R. T. 322; Ex. N]:

"25 February 1943

In the Matter of:

"Dr. Hans Zimmerman, internee.

"REMARKS

"Colonel Morrison

"Sir:

"Recommended the order attached hereto.

"Captain Black of Colonel Bicknell's office informed me over the telephone this afternoon that he would notify the Provost Marshal General, the Judge Advocate General, and the Western Defense Command when this internee was placed on board a boat to be sent to the mainland. General Green was very anxious that the fact that this man was leaving for the mainland be imparted, as I recall, to the Judge Advocate General, or perhaps it was to the War Department. However, it seems to me that if we advise the three agencies mentioned above all the necessary agencies of the War Department have received this information.

"Colonel Bicknell's office has received no instructions from me to notify the internee of his proposed departure. Colonel Bicknell prefers that the internee not be so notified until at least after he is placed on board the boat.

"Arrangements are being completed for the internee to go in the custody of Major Ballentyne to the mainland.

"Slattery."

[C. T. 127; R. 313; Ex. I; April 5, 1943]:

"Upon what conditions if any was Hans Zimmerman released pd Information desired by radio paren This is paraphrase of our three seven two zero paren from Judge Advocate General Signed Cramer for Executive to Military Governor."

[C. T. 126; R. 318; Ex. J; April 5, 1943]:

Zimmerman was unconditionally released from internment upon his arrival on the mainland in the United States.

[C. T. 125; R. 318; Ex. K; May 13, 1943]:

"Case of Zimmerman was dismissed by Supreme Court of United States on May third as moot because of the release paren signed Green paren of Zimmerman for Office Military Governor."

APPENDIX G.

May 15-1942

Lt. General D. C. Emmons
Military Governor
Honolulu, T. H.

Dear Sir:

After being detained, interned as an enemy alien at Camp McCoy, Wis. and from there returned and again detained in Sand Island for over five months as a reward for being a lawabiding and loyal Citizen, I appeal to you to assert your influence that the high tradition of U. S. Military justice may prevail in my behalf.

I fully realize that your valuable time and present effort is largely engaged in the successful prosecution of this war and therefore have to depend on your subordinates whom you entrusted with the enforcement of law and order, so that individual Citizens are accorded due justice.

I can state with all sincerety that justice in my behalf has been miscarried and that I am the victime of hostile and revengeful medical politicians who seized this opportunity with the aid of martial law, not only to eliminate me as a competitor in the medical field, but likewise succeeded to disgrace me as a Citizen without being given the right to defend myself, human rights which any one could expect in any civilized Country. The result is that I am a liability to our Country instead of an asset in this critical time.

I am a licensed Naturopathic Physician in this Territory and specialize in Physical Therapy. By reason of my training, experience and success in this field of medicine I am, without exageration on my part, one of the

most qualified specialist in this Territory and am likewise recognized as such by our National Professional Ass'ns and the Smithsonian Institute which accorded me the honor to become a recorded patron of their Institution as a reward for my successful service in this humanitarian profession. You may verify about my proffessional integrity with Maj. General James R. Woodruff whom I had the honor to serve as one of my patients.

On Monday morning Dec. 8-1941 I offered my services and all the facilities of my especially equipped clinic of Physical therapy to Trippler General Hospital, but my desire to serve was sabotaged by being arrested the same afternoon.

It seems reasonable to me as a sincere American Citizen that such wicked injustice should come to your attention in order that you may intervene in such form of sabotage which is bound to undermine our national war effort.

In appealing to you, I am not asking for favors, all that I ask for is justice. It seems strange why I as a U. S. Citizen should suffer this fate when we have five million enemy aliens in our Country and only three thousand of them have been interned. I accepted America as my Country and our Constitution as the law of our Nation. My whole interest is centered on its preservation. It is ridiculous for any one to assume that I should in any way jeopardize my wife's and my future happiness. To be classed as dangerous or inimicable to the best interest of our Country, when we have it so much at stake here, is hardly consistent. We rely entirely on this Country and the preservation of our democratic Institutions for which we are willing to sacrifice.

I would indeed appreciate your effecting my release. Thereby relieving my wife and myself of the anxiety and mental anguish to which we have been and still are subjected to for such a long and indefinite time. If my desire to serve in our armed forced can not be granted here, I should like to be given the opportunity in a medical rehabilitation unit on the mainland where my services could be of more value to our Country's interest then being incarcerated in this detention camp.

If neither of these opportunities should present themselves, I would like to take up additional medical studies with the intention of preparing myself for examination before the National Board of Medicine and Surgery and thus remove for once and all the antagonism and hostility which I always had to content with of organized medicine and which undoubtly caused my present ignominious position.

There is no doubt in my mind of you understanding the injustice and humiliation suffered by me during the past five months. Consequently, I am certain that your influence can rectify this ghastly miscarriage of justice. Such action of yours would indeed give me the assurance that my faith in U. S. Military justice has not been misplaced and subsequently would give me more reason than ever to be a proud American.

Respectfully yours,

/s/ Dr. Hans Zimmerman

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 497

HANS ZIMMERMAN, PETITIONER

v.

DELOS C. EMMONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

Earlier interlocutory decisions of the United States District Court for the District of Hawaii in these proceedings are reported *sub. nom. Zimmerman* v. *Poindexter, et al.*, at 74 F. Supp. 933 and 78 F. Supp. 421 (Pet. App. 1–6). The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. 7–10, R. X 3–6)[1] is reported at 225 F. 2d 97.

[1] Since only Volumes II to VII of the record are paginated consecutively, references are made to volume (roman numeral) and pages (arabic numerals) of the certified record.

JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 1955 (R. X 7). The petition for a writ of certiorari was filed on October 29, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Following a trial, petitioner's claim for damages was submitted to a jury under instructions of which some were requested by petitioner and of which none were objected to by him. He made no motion for a directed verdict or for judgment notwithstanding the verdict against him. The first question presented is whether, in these circumstances, petitioner could argue on appeal that he was entitled to judgment as a matter of law.

2. Whether the evidence was legally sufficient to sustain the jury's finding that respondent was not personally liable to petitioner for the consequences of official acts performed by him as Commanding General of the Hawaiian Department in carrying out his official military duties with respect to the defense of Hawaii during the first sixteen months of World War II.

STATEMENT

Following the Japanese attack on Pearl Harbor, on December 7, 1941, petitioner, a resident of Hawaii, was interned from December 8, 1941, to March 12, 1943. Claiming that respondent,

the Commanding General of the Hawaiian Department during most of this period, had exceeded his authority in retaining him in internment, petitioner filed his complaint in the instant case seeking to recover damages. Shortly before the trial was to begin, petitioner, on the basis of the pleadings and voluminous other papers, moved for summary judgment, which the district court denied on the ground that there were genuine issues of material fact. A trial lasting fifteen days was then had, and the case was submitted to the jury. Petitioner did not move for a directed verdict, nor did he object to any of the instructions given to the jury. After the jury found for respondent, petitioner moved for a new trial, which was denied. On appeal, the court below affirmed, holding that the various allegations of error had in several instances not been properly saved for appellate review and in any case were without merit.

The testimony given and presented by respondent—and believed by the jury, as evidenced by the verdict—may be summarized as follows:

1. The situation in Hawaii following the attack on Pearl Harbor

As the result of the surprise attack on Pearl Harbor, serious, if not crippling, injuries had been inflicted upon the Pacific fleet (R. III 421). In addition, the islands themselves were in an extremely precarious military situation. The lo-

cation of the Japanese fleet was unknown. The ground forces were inadequate to ward off an assault in strength upon Oahu, and there was practically no defense on the other islands (R. III 413). The Hawaiian Islands were of the utmost strategic importance; they constituted the most important bastion upon which the security of the West Coast depended; their capture by enemy forces would have interfered most seriously with the prosecution of the war (R. VII 2186–2187, 2192–2193). Until the latter half of 1943, Hawaii was considered a combat zone located in an active theatre of war (R. III 365, 534–536, VII 2185–2186). There were considerable enemy aerial and submarine activities in the islands during the first two years of the war, including shellings, bombings, and at least one sinking in the inter-island channels (R. VII 2189–2190).

While the military situation in Hawaii improved as the war progressed, the islands were still weak in April 1942 (R. III 486). Attacks in considerable strength could have been made upon them until the early part of 1943 (R. III 535–536), and raids by carriers and submarines as late as the spring of 1944 (R. III 536, VII 2193–2195, 2204–2205).

In these circumstances, it was of the utmost importance to prevent the leaking out to the enemy of any information concerning the damage

to the Pacific fleet (R. III 421),[2] the state of military preparedness on the Hawaiian Islands (*supra*, p. 4), and the presence of convoys and fighting vessels en route to other combat areas and of damaged ships returning from battle (R. III 458–459, VII 2190, 2205).

The tremendous task of keeping this information inviolate was complicated by the fact that virtually all of these activities took place in full view of the residents, and thus were common knowledge on the islands (R. III 377, 426). Consequently, this information could be picked up easily by espionage parties landing from submarines at night (R. III 459, VII 2206).

This intelligence problem constituted one of the reasons for an order of General Short, in command of the islands during the Pearl Harbor attack, pursuant to which all persons considered potentially dangerous were taken into custody (R. III 840–842).[3] The arrests were made on the basis of lists of persons considered dangerous for

[2] It is doubtful whether the United States would have succeeded at Midway had the Japanese been aware of the full damage they had inflicted upon the Navy at Pearl Harbor and realized the inadequacy of the forces that were opposing them (R. III 422).

[3] Respondent took over the duties of Commanding General of the Hawaiian Department and of Military Governor of the Territory of Hawaii on December 17, 1941 (R. II 220, 223). His duties included the defense of the Hawaiian Islands, and of all other islands in the Pacific garrisoned by Army troops. Internal security constituted a part of this responsibility. (R. III 402.)

the internal security compiled by the Army Intelligence (G–2), Office of Naval Intelligence (ONI), and the Federal Bureau of Investigation (FBI) (R. III 839–842).

2. Petitioner's detention and release

Petitioner, a naturalized American citizen of German descent, was taken into custody along with others on December 8, 1941, because he was listed by the FBI as a person to be apprehended in case of a war with Germany as a "potential dangerous pro-Nazi" (R. III 908).

On December 20, 1941, a Hearing Board consisting of two civilians (R. I 141, 153) examined the reasons for petitioner's detention (R. III 967). Petitioner was accorded the right of counsel (R. III 350) and the privilege to call witnesses (R. III 958). He availed himself of the latter privilege (R. III 959).[4] However, he was not present when an agent of the Federal Bureau of Investigation testified against him, and thus could not cross-examine him (R. III 973–975, IV 1011–1012).

On the basis of this hearing the Board found:

> 1. That the internee [petitioner] is a citizen of the United States.
>
> 2. That the evidence presented by the F. B. I. shows that the internee had pro-

[4] One of the character witnesses called by petitioner was the father of one of the Hearing Board members (R. III 958–959).

Axis leanings and at numerous times suggested that the greatness of Hitler would eventually make him the ruler of the world.

3. That the record of the F. B. I. shows the internee to have been active in interests inimical to the interests of the United States.

It recommended that petitioner be interned for the duration of the war (R. I 150, R. IV 1330). On February 16, 1942, a Reviewing Board consisting of the representatives of the three Intelligence Agencies, G–2, ONI and the FBI, concurred in the recommendations of the Hearing Board (R. I 152). The following day respondent, as the Military Governor of Hawaii (see *supra*, p. 5, fn. 3), ordered that petitioner be interned (R. I 152, R. II 221).[5]

In ordering petitioner's internment, respondent bore no malice toward petitioner (R. III 465). He reviewed petitioner's case together with some fifteen or twenty other proceedings (R. II 223),[6] relying largely on the recommendations of the Hearing Boards and of the Reviewing Boards (R. II 225–226, III 342–343). He had great confidence in the representatives of the security

[5] The order actually was signed by respondent's Executive Officer, Col. (later The Judge Advocate General) Green (R. I 152).

[6] Respondent was greatly concerned over the fact that a number of American citizens had been detained, and gave the review of those cases top priority (R. III 420).

agencies, especially Mr. Shivers, the local head of the F. B. I. (R. III 343), and felt that the concurrent recommendations of the Hearing Board and Reviewing Board to intern a person constituted "a fact that you can't laugh off" (R. II 297).

While respondent did not believe that petitioner was a spy, he was convinced that petitioner was potentially dangerous (R. II 232–234, 246, 298). In view of the tremendous risks at stake and of his personal responsibilities for the safety of the Nation, respondent was not, and could not be, taking any chances. By necessity, he used the term "potentially dangerous" in a very broad way (R. III 376), and leaned over backward in order to achieve as much security as possible (R. III 409). Respondent realized that very serious hardships may have been inflicted upon citizens and injustices may have been committed. He pointed out, however, that this was the result of military necessity and felt that relief might be given by special Act of Congress to those citizens as to whom it appeared that the internment was a mistake and unjustified (R. III 409).[7]

As pointed out, *supra*, p. 7, the formal order directing petitioner's internment was issued on

[7] Petitioner's actual loyalty is by no means established or conceded. Cf. Pet. 3, fn. 2, 7–8. The full text of the statement of respondent's counsel to which petitioner refers (R. II 39–43) shows plainly that he did not concede petitioner's loyalty (R. II 41), but merely that in his opinion the latter was not in issue, the true question being respond-

February 17, 1942. On February 19, 1941, petitioner's wife filed a petition for a writ of habeas corpus in the United States District Court in Hawaii. The following day the court denied the writ by reason of the Military Governor's General Order No. 57 of January 27, 1942, which prohibited the issuance of the writ (R. II 281–282).[8]

Respondent explained at the trial that the suspension of the writ of habeas corpus was continued only in order to protect the islands (R. II 271) and for security reasons (R. II 286).[9] At the time the habeas corpus proceedings in this case were instituted, less than three months after the Pearl Harbor attack, the Hawaiian Islands were an active combat zone, subject to sporadic shellings and bombings (*supra,* p. 4), and the respondent bore the ultimate responsibility for their military and internal security. In this capacity he had access to much secret and stra-

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ent's good faith in carrying out his responsibilities. Respondent did not admit that the treatment given petitioner caused hardship and damage or that it was a mistake. He merely stated that hardships could have been inflicted upon innocent persons, and that mistakes may have been made in *some* cases. R. III 409–410, quoting Emmons' deposition, p. 82.

[8] While the court stated that the writ would have issued as a matter of course but for General Order No. 57 (R. II 281), it did not and, of course, in the absence of a hearing, could not state whether it would have ordered petitioner's release (cf. Pet. 11–12, fn. 10).

[9] The writ had originally been suspended on December 7, 1941, with the approval of the President. See *Ex parte Zimmerman,* 132 F. 2d 442, 444 (C. A. 9).

tegic information which by necessity was not available to the courts.

Immediately after the denial of the writ of habeas corpus, petitioner, together with a group of other internees, was transferred from the internment camp at Sand Island, in Honolulu Harbor, to Camp McCoy, Wisconsin (R. II 287–290, III 434–435). The purpose of this action was not to moot the habeas corpus proceedings (R. III 437–438); two months later petitioner was returned to the jurisdiction of Hawaiian courts and of the United States Court of Appeals for the Ninth Circuit (see *infra*). As respondent pointed out, the motives for the transfer were the inconvenient location of the camp, potential crowding, the food problem on the islands, and similar technical considerations (R. III 434–435, IV 1419). Once petitioner and his fellow internees were on the mainland, it developed, however, that they might be freed by writs of habeas corpus. Respondent decided that in view of the vital nature of the information held by the internees and of the importance of preventing its dissemination, their release on the mainland would be extremely dangerous. He therefore ordered the return of the internees, including petitioner, to Sand Island (R. II 296, III 501), where they remained until released.[10]

[10] The food at Sand Island was good and the internees were housed as well, if not better, than soldiers (R. II 301, IV 1385–1408). The camp was inspected by the Interna-

Meanwhile, petitioner appealed the denial of the writ of habeas corpus to the Court of Appeals for the Ninth Circuit, which affirmed on December 14, 1942. *Ex parte Zimmerman,* 132 F. 2d 442. A petition for a writ of certiorari, filed on March 13, 1943, was denied as moot, because petitioner had been removed from Hawaii on March 3, 1943, and released on the mainland on or about March 12, 1943 (319 U. S. 744; see also the Government's Memorandum suggesting mootness in *Zimmerman* v. *Walker*, No. 823, October Term, 1942).[11]

As pointed out, *supra,* p. 7, fn. 6, respondent was deeply concerned about the internment of American citizens. Accordingly, he directed that their files be reviewed periodically in order to determine whether the internees could be released safely (R. III 453–454).[12] In the early part of 1943, respondent felt that the military situation had changed to such an extent that information known to petitioner

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tional Red Cross, which certified that "the camp is the most excellent from all viewpoints," and that "All the internees are unanimous in affirming that the authorities treat them well and they express only praise and sentiments of respect for the commander of the camp. We wish also to stress again the cleanliness in the superb sanitary installations and also the beautiful kitchens in the camp" (R. VI 2000–2003).

[11] So far as we are aware, petitioner at no time sought bail or release on bond from any Justice of this Court. See Rule 45 of the former Rules of this Court on "Custody of prisoners pending a review of proceedings in habeas corpus."

[12] Petitioner's case was reviewed in June 1942, but he was rejected for parole at that time (R. III 685, 688).

as well as to some 200 other internees had lost its strategic value, and that it had become safe to release petitioner on the mainland (R. III 381, 386, 522).[13] Therefore, a formal order directing petitioner's release was issued on February 11, 1943 (R. II 305, III 702).[14] The actual decision to release petitioner had been made somewhat earlier (R. III 489, 492). As far as respondent was concerned, petitioner's release was motivated solely by considerations of security (R. II 305, 328–329); it was his firm conviction that he could not compromise his duties with respect to security on the basis of speculations as to what the courts might do in the future (R. III 444).

3. The proceedings below

After the termination of hostilities, petitioner instituted this civil damage action for false imprisonment, deprivation of earning power, and defamation of character against many of the officials connected with his imprisonment. The complaint named as defendants Joseph B. Poindexter, Governor of the Territory of Hawaii on December 7, 1941, General Walter C. Short, Command-

[13] The time was not deemed ripe in September 1942 (cf. R. III 492–493).

[14] The release might have been ordered earlier had it not been for the presence of a large number of warships in Honolulu (R. III 385).

ing General of the Hawaiian Department on December 7, 1941, the respondent, General Delos C. Emmons, General Thomas H. Green and General William R. C. Morrison (colonels at the time of the events in question), who had been executive officers to the Military Governor, I. H. Mayfield, George W. Bicknell, and Robert L. Shivers, members of the Reviewing Board, and Frank Thompson, Jr. and Joseph J. Kelley, members of the Hearing Board which had recommended petitioner's internment.

Since respondent was not a resident of Hawaii, petitioner could not obtain service on him. He brought actions against him in the District of Columbia and West Virginia, which aborted because respondent was not a resident of those jurisdictions either. Service finally was effected on respondent in an action brought in California, respondent's actual residence. (Pet. 27.) Petitioner, however, was desirous that respondent be a party to the Honolulu trial. In order to accommodate petitioner, respondent agreed to submit to the jurisdiction of the District Court for the Territory of Hawaii in consideration of petitioner's promise that he would not make any attempt to take out execution and to make collection until all appeals had been exhausted, and until a reasonable period had expired to enable respondent to attempt the passage of a private bill pro-

viding for the payment of any judgment which petitioner might recover (R. IX 2).[15]

On November 30, 1950, on the eve of the trial, which opened on December 5, 1950,[16] petitioner moved for summary judgment on the basis of the pleadings and of hundreds of pages of depositions, requests for admissions and answers thereto, exhibits, and memoranda of law (R. I 156–157, 1B–1C). The court denied the motion (R. II 54–58, VII 2165).

The trial before a jury lasted from December 5, 1950, to December 20, 1950. The transcript of the proceedings numbers more than 2,300 pages (R. VII). At the very end of the trial petitioner filed a third amended complaint, dismissing the proceedings against all defendants except respondent (R. I 176). The jury rendered its verdict in favor of respondent (R. I 186). Petitioner did not move for a directed verdict, did not object to the court's charge to the jury,[17] and did not move for a judgment notwithstanding the

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[15] During the trial petitioner's counsel assured respondent "it is not intended to get any money out of you" (R. III 411).

[16] By that time, the District Judge specially designated to hold court, respondent, his counsel, and even some of petitioner's counsel had proceeded to Hawaii from the mainland.

[17] R. VII 2257. "Mr. Wirin [petitioner's counsel]: 'Yes. Secondly, we intend to file no exceptions to the court's charge. The plaintiff has spent all his money and can't appeal, anyway. Anyway, we do not intend to file any exceptions'."

verdict. He did, however, move unsuccessfully for a new trial (R. I 200–220, 222).

On appeal, petitioner urged as error the denial of his motion for summary judgment, the exclusion of evidence referring to the agreement that petitioner would not seek enforcement of a judgment without giving respondent a reasonable opportunity to obtain a private act of Congress,[18] the giving, and refusal to give, of certain instructions, and the denial of the motion for a new trial. He also urged that the verdict was contrary to, and not supported by, the evidence, and that there had been "moral coercion of the jury" (Pet. App. 7–10).

The Court of Appeals affirmed. It held that there had been issues of fact precluding the granting of summary judgment, that petitioner had not complied with the rules requiring the specification of errors concerning the admission and exclusion of evidence and objections to the charge, and that in any event the pertinent assignments of error were without merit; that the contention that the verdict was against the weight of the evidence could not be considered in the absence of a motion for a directed verdict; and that no abuse of discretion had been shown in the denial of the motion for a new trial (Pet. App. 7–10).

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[18] Petitioner had agreed in substance with the court's instruction to the jury to disregard all evidence concerning this agreement (R. VII 2218–2227).

ARGUMENT

Under instructions probably unduly favorable to petitioner, and never objected to by him, the jury returned a verdict absolving respondent of personal liability in damages. By this verdict, it is conclusively settled that respondent acted reasonably and without personal malice, under a Presidentially approved declaration of martial law, and under the pressure of exigent military necessity.[19] In the discussion which follows, we note first of all the dispositive fact that petitioner, in addition to accepting the instructions to the jury as correct, never moved for a directed verdict or for judgment notwithstanding the verdict, so that his effort on appeal to overturn the verdict as contrary to law must be rejected at the outset. We then summarize the settled principles which would, in any event, require rejection on the merits of petitioner's attempt to hold respondent personally liable for the wartime action under his military command of which petitioner complained. Both points—the conclusiveness of the verdict as a basic matter of procedure and the substantive fallacy in petitioner's claim even if it were open

[19] Since petitioner has been free for more than twelve years (see *supra*, pp. 11–12), the case does not raise any question as to whether petitioner should be released from confinement. Nor does the case involve the validity of the suspension of the writ of habeas corpus; the jury was expressly instructed that the suspension of the writ did not render inoperative petitioner's constitutional rights (R. VII 2322–2323).

here—demonstrate the absence of grounds for certiorari.

1. Petitioner attempts here, on a version of the facts different from those established by the jury's verdict, to argue that he was entitled to damages as a matter of law. However, under settled limitations on appellate review of jury verdicts which have their source in the Seventh Amendment, it is clear that the legal sufficiency of the evidence is not open for review. For this question may be raised on appeal only where there has been a motion for a directed verdict, presenting the question whether the case may properly go to the jury, or some objection to instructions or a legal ruling which poses in the trial court and preserves for appeal an issue of law.[20] Petitioner took no such action. Accordingly, his effort on appeal to overturn the verdict on the ground that there was no question for the jury—contrary to the instructions given at his request, which presented such questions (*infra*, p. 18)—was properly rejected by the court below. As that court correctly held (Pet. App. 10), the failure to move for a directed verdict could not be

[20] Rule 50, Federal Rules of Civil Procedure; *Woodbridge* v. *Dupont*, 133 F. 2d 904 (C. A. 2); *Flint* v. *Youngstown Sheet & Tube Co.*, 143 F. 2d 923, 924 (C. A. 2); *Harriman* v. *Midland Steamship Line, Inc.*, 208 F. 2d 564 (C. A. 2); *Home Ins. Co. of New York* v. *Davila*, 212 F. 2d 731, 733 (C. A. 1); Moore, *Federal Practice* (2d Ed.), Vol. 5, Section 50.05 [1].

cured by petitioner's attempt to raise the issues thus foreclosed by appealing from the denial of his motion for a new trial.[21]

Similarly unavailing is petitioner's effort (see Pet. 8–9, 16–17) to achieve the same result by arguing that it was error to deny his motion for summary judgment. Both courts below were correct in holding that petitioner had not met the burden of showing that the hundreds of pages of pleadings, depositions, admissions, exhibits, and memoranda attached to the motion for summary judgment did not raise genuine issues of material fact. That such issues existed is evident from petitioner's own requests for instructions to the jury (Nos. 21 and 22, R. I. 266, 267), which recognized the materiality of the vigorously contested issues whether respondent had acted unreasonably or arbitrarily in the circumstances and whether his acts were justified by military necessity.[22]

2. On its merits, assuming *arguendo* that they could be considered here, the jury's verdict deny-

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[21] See cases cited *supra*, fn. 20. Petitioner apparently claims now (Pet. 17) that his Request for Instructions to the Jury No. 13 (R. I 256) constitutes the equivalent of a motion for a directed verdict. This request, hidden as it was among some twenty pages of other requests plainly recognizing the presence of issues of fact, is not the equivalent of the express motion required by the Rules. Moreover, the request was not granted, and petitioner made no objection to the charge as given (*supra*, p. 14).

[22] Although he expressly waived any objections to the charge (*supra*, p. 14, fn. 17), and apparently presents no

ing petitioner's claim is correct. For there is ample evidence in the record to support the jury's conclusion that respondent acted reasonably and without malice to petitioner; that he took the actions he did solely in an effort to discharge, to his best ability, his overwhelming responsibility to protect the security of this country from threatened enemy invasion; and that these actions were required by the exigencies of the situation. And it is clear, under settled principles, that respondent could not be called upon to respond personally in damages for the allegedly improper actions performed under his command.

The courts have recognized as a matter of overriding public policy that public officials "shall be controlled solely by the statutory or administrative mandate and not by the added threat of private damage suits." [23] The fear that potential personal liability would paralyze official action is by no means imaginary. This Court only recently recalled the notable incident of the Great

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question for review on the charge (see Pet. 2–3), petitioner includes in his argument some attacks on the instructions to the jury (Pet. 17, 27–28). These fatally tardy contentions are obviously precluded. Rule 51, Federal Rules of Civil Procedures; *New York, N. H. & H. R. Co.* v. *Zermani*, 200 F. 2d 240, 245 (C. A. 1), certiorari denied, 345 U. S. 917; Moore, *Federal Practice* (2d Ed.), Vol. 5, par. 51.04; Barron & Holtzoff, *Federal Practice and Procedure*, Vol. 2, § 1103.

[23] Mr. Justice Jackson, dissenting in *Dalehite* v. *United States*, 346 U. S. 15, 59.

Fire of London of 1666 in which one-half of the City was destroyed because the Lord Mayor, for fear he might be answerable in trespass, refused to give the instructions necessary to contain the fire.[24] Far graver considerations of national safety argue here against a decision which would subject respondent to personal liability in damages for the acts he committed while he was charged with the responsibility for the defense of Hawaii and of the West Coast (*supra,* pp. 3–5). Only the most resolute or the most irresponsible could discharge their duties in such circumstances.[25]

In view of these considerations, it is well settled that an executive official of the Government, regardless of his motives, is not personally liable for an act which is within the general scope of his official authority. *Spalding* v. *Vilas,* 161 U. S. 483, 498. This rule of complete immunity of executive officials from individual damage suits for any action within the general scope of their authority has been applied to cabinet officers (*Spalding* v. *Vilas, supra; Standard Nut Margarine Co.* v. *Mellon,* 72 F. 2d 557 (C. A. D. C.), certiorari denied, 293 U. S. 605; *Gregoire* v. *Biddle,* 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949); the Comptroller of the Currency,

[24] *United States* v. *Caltex, Inc.*, 344 U. S. 149, 155, fn. 7; and see *Respublica* v. *Sparhawk*, 1 Dall. 357, 363.

[25] Cf. Learned Hand, J., in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C. A. 2), certiorari denied, 339 U. S. 949.

a United States Attorney and his Assistant (*Cooper* v. *O'Connor,* 99 F. 2d 135 (C. A. D. C.), certiorari denied, 305 U. S. 643); a member of the Securities and Exchange Commission (*Jones* v. *Kennedy,* 121 F. 2d 40 (C. A. D. C.), certiorari denied, 314 U. S. 665); Army officers (*Burns* v. *Spiller,* 161 F. 2d 377 (C. A. D. C.), certiorari denied, 332 U. S. 792); and to many other classes of federal officers (see *e. g., Yaselli* v. *Goff,* 12 F. 2d 396 (C. A. 2), affirmed, 275 U. S. 503; *Lang* v. *Wood,* 92 F. 2d 211 (C. A. D. C.), certiorari denied, 302 U. S. 686; *Adams* v. *Home Owners' Loan Corp.,* 107 F. 2d 139 (C. A. 8); *Gibson* v. *Reynolds,* 172 F. 2d 95 (C. A. 8), certiorari denied, 337 U. S. 925; *Dodez* v. *Weygandt,* 173 F. 2d 965 (C. A. 6); *DeArnaud* v. *Ainsworth,* 24 App. D. C. 167; *Phelps* v. *Dawson,* 97 F. 2d 339 (C. A. 8); *Papagianakis* v. *The Steamship Samos,* 186 F. 2d 257 (C. A. 4), certiorari denied, 341 U. S. 921).

Gregoire v. *Biddle,* 177 F. 2d 579 (C. A. 2), certiorari denied, 339 U. S. 949, involved facts almost identical to those here. Gregoire was interned as an alien enemy during World War II. In contrast to petitioner, who was freed voluntarily after 16 months (see *supra,* pp. 11–12), Gregoire regained his freedom by writ of habeas corpus only after nearly five years of detention (*United States* v. *Watkins,* 164 F. 2d 137 (C. A. 2). The very court which ordered Gregoire's release, however, held that he was not entitled to re-

cover damages from the officials responsible for his imprisonment. In his opinion for the court, Chief Judge Learned Hand, after carefully weighing the countervailing considerations between the citizen injured by possibly illegal official action and the public official who would have to perform his duties subject to "the constant dread of retaliation," struck the balance in favor of the latter.[26] He said (177 F. 2d at 581):

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put

[26] See also *Cooper* v. *O'Connor*, 99 F. 2d 135, 141–142 (C. A. D. C.), certiorari denied, 305 U. S. 643.

to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books.

The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for

any of the purposes on whose account it was vested in him.

Here, the case against personal liability is even clearer than the foregoing principles require. Under instructions which were more favorable to petitioner than the controlling precedents, the jury was left to examine respondent's motives for official actions under his command (R. VII 2275) and was even permitted to reexamine the military necessity for these actions, on the theory that only such necessity would prevent personal liability (R. VII 2271). There is therefore no possible basis in law for petitioner's claim that the verdict denying recovery should now be set aside.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1955.

No. 497

HANS ZIMMERMAN,

Petitioner,

vs.

DELOS C. EMMONS.

Petitioner's Reply to Brief in Opposition to Petition for Writ of Certiorari.

"ONCE PETITIONER AND HIS FELLOW INTERNEES WERE ON THE MAINLAND, IT DEVELOPED, HOWEVER, THAT THEY MIGHT BE FREED BY WRITS OF HABEAS CORPUS. RESPONDENT DECIDED THAT IN VIEW OF THE VITAL NATURE OF THE INFORMATION HELD BY THE INTERNEES AND OF THE IMPORTANCE OF PREVENTING ITS DISSEMINATION, THEIR RELEASE ON THE MAINLAND WOULD BE EXTREMELY DANGEROUS. HE THEREFORE ORDERED THE RETURN OF THE INTERNEES, INCLUDING PETITIONER, TO SAND ISLAND [R. II 296, III 501], WHERE THEY REMAINED UNTIL RELEASED."

The above quotation is not that of petitioner, nor is it taken from petitioner's argument, nor is it petitioner's version of the facts. This statement of respondent's usurpation of power is that of respondent himself in this court at page 10 of his Brief in Opposition!

We submit that were there nothing else in this case—no problem of due process concerning a fair hearing and an opportunity to know at least something of the charges against petitioner and an opportunity to meet them—this statement by respondent shows on its face the abuse of authority exercised by him and is, in and of itself, compelling reason why this court should grant the petition and decide whether such flaunting of the civil authorities can be tolerated.

This statement by respondent demonstrates more clearly, because it is that of respondent, how he acted as ruler, judge, prosecutor; in short, how he ignored the Constitution. It states more eloquently than could petitioner how respondent, patently and concededly, disregard the fundamental principle of our nation as to the supremacy of the civil over the military. This court has spoken on this in many cases, from which the following are but two excerpts.

Dow v. Johnson, 100 U. S. 169, 25 L. Ed. 632, 636:

> "We fully agree in the doctrine . . . that the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend of the Republic who advocates the contrary. The established principle of every free people is, that the law alone shall govern; and to it the military must always yield."

Ex parte Milligan, 4 Wall. (U. S.) 2, 18 L. Ed. 281, 295:

> "Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and devisive measures to accomplish ends deemed just

> and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

The statement by respondent proves without peradventure of doubt, that which petitioner thought was clear all along, respondent's unwillingness to trust to the courts to sustain his power where necessary (*Korematsu v. United States,* 323 U. S. 214), because he knew that where not necessary, the courts would not sustain him (*Ex parte Endo,* 325 U. S. 273). But respondent was not willing to act pursuant to law or the Constitution. By his admitted conduct, respondent proved the validity of Louis Smith's statement in his book, *American Democracy and Military Power,* Univ. of Chicago Press, 1951, page 274, where he said:

> "(T)he military have a notorious penchant for . . . making it (martial rule) more severe than might be necessary, and for perpetuating the condition beyond what is strictly justified."

As stated, we believe that nothing more than respondent's statement quoted above is necessary for this court to see the need for granting the petition. For the sake of completeness, however, we turn to, and answer, respondent's argument.

Preliminary Statement.

It is noteworthy that respondent's brief seeks to avoid the central issues raised in the petition. The most perfunctory treatment (Br. 18, ½ page) is given petitioner's claim that the motion for summary judgment should have been granted. Not even the questions presented in the government's brief (Br. 2) are these presented to this court by the petition (pp. 2 and 3). No direct challenge is made to petitioner's factual claims, all made and established at the motion for summary judgment. For example, that the purpose of petitioner's release on the mainland in 1943 was to moot the previous case before this court (Pet. 14-16).

Respondent suggests that his motivation was solely by considerations of security (Br. 12). But this is clearly negated by the fact that the security people, especially Mr. Shivers (in whom respondent had great confidence (Br. 7, 8)), were not even consulted [Shivers Dep. 204, 212, 213; Bicknell Dep. 112; C. T. 136], they had no part in it [Bicknell Dep. 64, 74, 76, 79, 80, 82, 111], and the release had nothing to do with security [Bicknell Dep. 91] and is emphasized by the fact that Dr. Zimmerman was the only person so released at that time (Pet. App. F, pp. 44-46).

I.

There Are No Procedural Reasons Why This Case Is Not Open to Review.

(Reply to Respondent's Point I, pp. 17-18.)

Respondent is quite in error when he asserts (Br. 2, 3, 14, 16, 17) that petitioner did not object to the instructions and that he made no motion for directed verdict.

A brief glance at the Clerk's Transcript [Vol. I of Record as certified to this court, herein designated as C. T.] from pages 279-295 shows that petitioner objected for 16 pages to the instructions proposed by respondent in addition to proposing his own instructions for some 34 pages [C. T. 239-274], to which respondent also filed objections [C. T. 275-277].

Moreover, that the trial judge knew exactly the position of the parties and neither expected, nor wanted, further objections is seen from the Reporter's Transcript:

R. T. 2036, 2037:

> "The Court: Yes. Now, there is one further matter before we leave. Neither side interposed their objections in regard to the requests for instructions of the other side, and my rule is that you should do that.
>
> Colonel Hughes: You mean itemize each request?
>
> The Court: No. Then you won't have to go into an argument. But I think the record should show just what the objection is in writing, just as we do down in the Southern District of California. That saves a great deal of time, and saves argument.
>
> Mr. Wirin: Yes, we will do that.

> The Court: And I can pass on them seriatim, without hearing any argument at all, because I know generally the line of instructions I am going to give. All I want to know is why the opponent to the one who makes the request objects."

Again, at R. T. 2364, the court said:

> ". . . when the court finally considered all of the objections of the respective parties it formulated its charge to the jury . . ."

Apparently respondent claims (Br. 14, f.n. 17; Br. 18, f.n. 21), because no formal exceptions repeating petitioner's objections to the instructions and repeating his requests for his own instructions were made, that this somehow means that petitioner cannot be heard to complain here on constitutional grounds. This argument disregards not only the procedure the trial court wanted followed [see quotes from R. T., above], but also is contrary to law. As pointed out at 2 *Baron & Holtzhoff*, Sec. 1104, page 810:

> ". . . Rule 51 is not top-heavy with technical excuses for overlooking trial court errors. After all only those errors are waived which might have been corrected had the proper objection or request been made. If the trial court is fully informed of the specific ground of objection or request, there is no need for repetition (citations). Few judges are aided by frequent repetition of objections which have once been overruled (citations)."

And again, 2 *Baron & Holtzhoff*, Sec. 1103, page 797:

> "A negative reply, however, to the court's query whether, apart from the preserved objections to rulings on the requests to charge, there was any excep-

tion to the charge, does not waive objections previously made to the refusal to give a requested instruction (citations)."

Furthermore, respondent overlooks the fact that exceptions to the charge are no longer required. As stated in 2 B & H, Sec. 1103, page 797:

> "Under Rule 46 exceptions to the giving or the failure to give an instruction are no longer required. An objection stating distinctly the objectionable matter and the grounds for objection is sufficient (citations). This conclusion is rested on Rule 8 of the general rules of the Supreme Court which is referred to in the Advisory Committee's notes as one of the sources of this rule and which before the promulgation of these rules, required specific exceptions to be taken to the charge. It would be strange indeed if the court, having abolished exceptions and bills of exceptions in all other instances, should require exceptions to instructions to which adequate objections had already been entered."

As to respondent's contention that no motion for directed verdict was made, this again is error as was pointed out by petitioner in his Petition (p. 9, f.n. 8). Respondent's suggestion that because petitioner's requested instruction [No. 13; R. T. 256] was one of a number requested by him, the request was somehow not made, is, to say the least, a peculiar argument, to say nothing of doing a great disservice to the trial judge. If petitioner was not moving the court for a directed verdict when he asked for the following instruction [R. T. 256]:

> "You are instructed that the detention of the plaintiff by the defendant, or under his orders, as Military Governor or as Commanding General, is illegal.

> "You are further instructed to award damages to the plaintiff for all losses suffered by him resulting from said detention, in accordance with the instruction on damages which the Court will give you,"

then language has no meaning.

The fact that the jury found against petitioner is no ground, as claimed by respondent (Br. 17) why the facts in the record on constitutional deprivation cannot be considered by this court. Indeed, as the cases pointed out by petitioner in his Petition (p. 18, f.n. 15) hold, the "facts" determinative of the denial of constitutional right in this kind of a case "are the very issues to review which this court sits." See also *Merchants National Bank v. City of Richmond,* 256 U. S. 635, 638; *Carlson v Curtiss,* 234 U. S. 103, 106; *Brooklyn Bank v. O'Neil,* 324 U. S. 697, 703; *Kern-Limerick, Inc. v. Scurlock,* 347 U. S. 110, 121; *Hoover & Allison Co. v. Evatt,* 324 U. S. 652, 659; *Pierre v. Louisiana,* 306 U. S. 354, 358; *Creswell v. Knights of Pythias,* 225 U. S. 246, 261-262.

Moreover, the facts relied upon by the petitioner were those adduced on the motion for summary judgment and not denied by respondent (Pet. 9-10).

And as to the motion for summary judgment, respondent has yet to point out what facts were in dispute. It is to be remembered that the motion was partial only (see Rule 56(d), F.R.C.P.), *i.e.,* on the issue of liability, not damages, and respondent himself has never denied the showing made on the motion. The suggestion (Br. 18) that there were issues *re* reasonableness and arbitrariness and justification by reason of military necessity fall flat if for no other reason that his admission both in his deposition and more forcefully here, that he ordered petitioner

back from the mainland in order to abort the judicial process of the United States. How can respondent claim this was anything other than unreasonable and arbitrary? And how can respondent, in view of the many decisions of this court claim that it was a question of fact as to whether he had the right to flaunt the open, functioning courts on the mainland? The suggestion that because, after his motion for summary judgment, petitioner requested instructions covering all contingencies calls for strange conduct on the part of a lawyer who has had a motion denied or an objection overruled.

II.

Petitioner Was Denied Due Process.

(Reply to Respondent's Point II, pp. 18-24.)

As pointed out by the petitioner, there are two grounds why this is the case here. The one is the denial to petitioner of anything resembling a fair hearing at least some time. The other is the blatant and starkly admitted (Resp. Br. 10) deprivation by respondent of petitioner's right to petition the courts on the mainland. Respondent chose not to reply to either of these issues, but relies on a theory of immunity from suit, a theory which, properly, neither court below accepted. Indeed the decision by the trial courts on the question (Pet. Appx. 1-6) is a complete answer to respondent's argument. Respondent ignores the many decisions of this court (see Pet. p. 5, f.n. 4) upholding the right of recovery in a case such as this. His chief reliance for support is *Gregoire v. Biddle,* 177 F. 2d 579 (C.A. D.C.) cert. den., 339 U. S. 949 and *Spalding v. Vilas,* 161 U. S. 483, neither of which applies.

In the first place the harsh doctrine of *Gregoire v. Biddle,* if it is to be followed at all, should be limited to the facts of that case, where two of the defendants were cabinet officers and the court followed the theory of immunity which has grown up as to such persons, and then equated the other defendants with the cabinet officers because they were acting under their direction. But as the cases previously cited by petitioner (Pet. p. 5, f.n. 4) demonstrate, this theory has never been applied to military officers who deprived citizens of constitutional rights, even though they acted reasonably and without malice.

In addition to those cases, this court has rendered many other decisions upholding the right to damages in a case such as this and there is abundant literature on the subject to the same effect.[1]

Aside from the fact that *Gregoire* is a Court of Appeals case and cannot, certainly, prevail in the face of the many decisions of this court to the contrary, we have examined the briefs in the case and note that none of the cases cited by petitioner both here (*supra,* f.n. 1) and in his Petition (p. 5, f.n. 4) were called to the attention of the court. Whether, had this been done, a different result would have obtained is, of course, conjecture. How-

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[1]*Tracy v. Swartout,* 10 Pet. U. S. 80; *Mitchell v. Harmony,* 13 How. U. S. 115; *Cammeyer v. Newton,* 94 U. S. 225; *Kilbourn v. Thompson,* 103 U. S. 168; *Poindexter v. Greenhow,* 114 U. S. 270; *Belknap v. Schild,* 161 U. S. 10; *Bell v. Hood,* 327 U. S. 678. The literature on this subject is voluminous. For a few examples, see 43 Am. Jur., Public Officers, 84 and 89 citing cases in footnotes 6 and 1, respectively; 135 A. L. R. 10-50, especially pp. 21-23 and 29-31; 54 Am. Jur., United States, 637-639; notes in 28 St. Johns Law Review 265, 9 Oh. S. L. J. 712 and 38 Mich. L. R. 1344. See also article by David in 12 S. C. L. R. 127 at 152 entitled Tort Liability of Public Officers, and by Jennings in 21 Minn. L. R. 263 entitled Tort Liability of Administrative Officers.

ever, we do point out that in granting to the Director of the Alien Enemy Control Unit the same immunity from suit as the Attorney General, it is clear that the *Gregoire* case is directly contrary to this court's decision in *Kilbourn v. Thompson,* 103 U. S. 168 where the members of the House of Representatives were accorded immunity, but the Sergeant-at-Arms of the House, who executed the House's order, was not.

Spalding v. Vilas, 161 U. S. 483, also relied on by respondent (Br. 20), is not apposite here. That is a case upholding immunity of a cabinet officer, an entirely different thing, as the cases show, than a military officer. Moreover, in that case, this court pointed out that there the defendant "did not exceed his authority, nor pass the line of his duty as Postmaster General" (161 U. S. 499). This is not the case here, where just the contrary is true. Under no conceivable theory did respondent have the authority or duty to snatch petitioner away from the mainland and transport him over the seas to abort the processes of the courts.

Respondent's argument (Br. 19-24) that the doctrine of immunity accorded to cabinet officers should be extended to cover military officers in order that they may feel free to violate the constitutional rights of those within their power is not only contrary to the decisions of this court, but, as history has shown, is not a valid or practical consideration because of the practice of Congress to pay or reimburse such damages (Pet. p. 28, f.n. 26).

Moreover, in contrast to the Lord Mayor of London example (Resp. Br. 20) is the long line of English precedents establishing the right to damages in a case such as

this, the most famous of which is that of John Wilkes (see Chaffee, *Free Speech in the United States,* pp. 243-244).

In effect, respondent is suggesting that *Mitchell v. Harmony,* 13 How. (U. S.) 115, and the other cases cited by petitioner (Pet. p. 5, f.n. 4; f.n. 1, *supra,* herein) should no longer be the law. Surely, if this court is prepared to overrule those cases, it should do so only after a grant of certiorari.

In any event, the extent of the personal liability of a military officer, or that he is not liable at all, is a substantial question that requires the grant of certiorari.

A. Respondent Is Liable for Removing Petitioner From the Mainland to Frustrate the Judicial Process.

We believe almost enough has been said by petitioner, as well as respondent (Br. 10), to make clear the need for the granting of the petition here. We refer, however, to this court's recent decision in *United States ex rel. Toth v. Quarles,* ..... U. S. ....., 24 Law Week 4005, Nov. 7, 1955, which was decided after the petition here was filed.

It is significant that in that case the trial court ordered Toth discharged on the ground that he should not have been carried off to Korea from the United States for trial without a hearing (113 F. Supp. 330; 114 F. Supp. 468). The parallel between that case and the case at bar is obvious. Indeed, petitioner's treatment was worse. Toth, at least, was carried back for trial where he would receive due process. Petitioner was carried off solely to be incarcerated.

But there is also significant language in this court's opinion which further demonstrates how unconstitutional was respondent's conduct. Thus this court said that:

> "Unlike courts, it is the primary business of armies and navies to fight or to be ready to fight . . ."

This, then, was respondent's primary task, not to abort the civil courts and reach his hand out to a jurisdiction not his.

Moreover, said this court, even in the exercise by the military of its admitted authority, it must be limited to "the least possible power adequate to the end proposed." It cannot be said that respondent thus understood or administered his power. While it may have been proper to incarcerate petitioner at the very beginning or even to exclude petitioner, as he did, from his command, his power ceased there, and he was required to yield, not usurp, the civilian control which had been set up to meet the problem.

Thus respondent set himself above Executive Order 9066 (7 Fed. Reg. 1407) and the Act of March 21, 1942 (56 Stat. 173), under which petitioner, on the mainland where he was, could have been excluded from, or kept in any area the military there felt necessary to guard against espionage and sabotage (*Korematsu v. United States,* 323 U. S. 214; *Hirabayashi v. United States,* 320 U. S. 81). Nor did respondent trust to the courts to assure that disloyal persons were not permitted at large. In *Ex parte Endo,* 323 U. S. 283, 302, this court said:

> "A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not a race, creed or color. He who is loyal is by definition not a spy or a sabo-

> teur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized."

It would seem from this to follow that a person other than one like Endo could be detained, but in so doing, the civilian power of government would decide that question, and we would suppose, in accordance with a hearing affording a minimum of due process. In other words, Congress was fully cognizant of the problem facing this nation and its military generals. It decided to meet these problems by civilian authority, at least on the mainland. Respondent would not, and did not, permit Congress' will to be followed.

This is especially noteworthy in view of respondent's own statement [Emmons Dep. 31] that petitioner was "not potentially dangerous if in the United States." (*Cf.* respondent's assertion (Br. 8) that the reason he ordered petitioner's internment was that he was "potentially dangerous," whatever that may mean.) And contrast this with respondent's statement now (Br. 10) that "in view of the vital nature of the information held by the internees and of the importance of preventing its dissemination" on the mainland, *he decided* to and did order petitioner's return to Hawaii. Aside from the plain usurpation of judicial power by respondent, there is no basis in the record for this assertion as to Dr. Zimmerman. There is no claim that Dr. Zimmerman had been near Pearl Harbor or knew anything about the nature or extent of the losses.

B. Petitioner Was Entitled to a Hearing Which Afforded Due Process, for the Denial of Which Respondent Is Liable in Damages.

Even conceding *arguendo,* that respondent had the right to incarcerate petitioner at the beginning for a short time (*Cf. Moyer v. Peabody,* 212 U. S. 78, 85), and passing by respondent's patent unconstitutional conduct in snatching petitioner from the mainland to avoid the courts, nevertheless at some time before his banishment, petitioner was entitled to a hearing that had some semblance of fairness.

The right, of which petitioner availed himself (Resp. Br. 6) to call witnesses was meaningless when neither petitioner nor his witnesses knew of any charge against him. Their general attestations as to Dr. Zimmerman's loyalty were meaninglessly helpful to him in this setting. So also was the "the right to counsel."

When measured against this court's view in the *Toth* case that the business of the military is to fight or be ready to fight and that the exercise by the military of its martial function is limited to the least possible power adequate to the end proposed, respondent's failure to afford petitioner a reasonable hearing, at some time, which left him other than in the dark, cannot be sustained. Respondent's failure was plainly and simply the unauthorized exercise of judicial power.

A recent decision by the court below, decided subsequent to the filing of the petition here by a different panel from the one which decided the instant case, *Parker v. Lester,* ..... F. 2d ....., No. 14081, Oct. 26, 1955, demonstrates respondent's failure.

The *Parker* case had to do with the Coast Guard screening program, and, like the instant case, was concerned with the problem, both during the Korean War, and since, of sabotage, security and subversive activities. In that case, the court below struck down a program, though "hearings" were required, where, like here, the burden was placed upon the seaman to prove his innocence, and where, like here, he knew "neither the names nor identity of his accusers nor anything else about them" (p. 5, slip opinion). The procedure was precisely that which was used here: "to obtain reports from the F.B.I., or some other governmental investigative agency, which procured statements in some undisclosed form from confidential sources" (p. 13, slip opinion).

The court posed these questions:

> "Whether the danger or possible danger to national security is of such character and magnitude that the ancient and generally accepted rights of notice and hearing envisioned by the Fifth Amendment may be denied to these seamen citizens."

And

> "Is this system of secret informers, whisperers and talebearers of such vital importance to the public welfare that it must be preserved at the cost of denying to the citizen even a modicum of the protection traditionally associated with due process?"

The court answered "No," relying upon such decisions of this court as *Morgan v. United States,* 304 U. S. 1; *Kwong Hai Chew v. Colding,* 344 U. S. 590, and recog-

nizing that security and national emergency are involved. The court said (p. 15, slip opinion):

> "What we must balance in the scales here does not involve a choice between any security screening program and the protection of individual seamen. Rather we must weigh against the rights of the individual to the traditional opportunity for notice and hearing, the public need for *a screening system which denies such right to notice and hearing.*" (Italics in orig.)

Measured against this case, we submit, the "hearing" afforded petitioner here simply does not pass the test. Thus, rather than apprize petitioner of what it was that was being held against him, the recorder immediately began [R. T. 186] to ask petitioner a series of questions[2] none of which even once suggested what it was petitioner was suspected of, who said what about him, where derogatory information, if any, was found. In short, petitioner was then, he is now, and so is everybody else, in the dark as to why he was being held and what he was supposed to meet.

The assertion today by respondent (Br. 8, f.n. 7) that "petitioner's actual loyalty is by no means established or conceded" is astounding. One would think that where the right to incarcerate a citizen were in issue, that during a two week, 2300 page, trial, at least something would be offered against petitioner by way of justification. No

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[2]As previously pointed out (Pet. 19, fn. 16) the hearing appears at 4 places in the record. For the convenience of the court, references to it here will be to the Reporter's Transcript R. T. 185-219.

such thing was done. Respondent's counsel's excuse, in the light of the *Endo* case, with which respondent's competent counsel was surely familiar, that petitioner's loyalty was not in issue, is lame indeed. Needless to say, had respondent had even an inkling of circumstances tending to establish that petitioner was disloyal, his counsel would have answered "Yes," instead of "No, sir." when asked by the trial judge as to whether he was "going to contend that the plaintiff here was disloyal" [R. T. 39].

As previously noted (Pet. p. 19, f.n. 16) the transcript of the hearing was a complete record thereof [Freund Dep. 11; R. T. 916]. Yet that record shows that only once was any "evidence" presented to the Board. And the evidence was presented on December 27, 1941 [R. T. 212-214] *after* the Board had made its recommendation that petitioner be interned for the duration [R. T. 211]. Not only was petitioner not present when this evidence was presented [R. T. 211], but an examination of this evidence conclusively demonstrates the utter lack of foundation for the treatment of petitioner. Thus the F.B.I. agent "duly sworn" stated [R. T. 213] that he had the "official Government records" concerning petitioner, and he proceeded to testify as to what they contained:

> that petitioner had an alias, Fritz Kuhn,[3] that he was born in Germany, immigrated to the United States,

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[3]Not even this allegation was communicated to petitioner. When he was being questioned [R. T. 193], he was asked if he knew Fritz Kuhn, or had ever heard of him, or whether any one had called him that. But that was all. Petitioner was never even extended the courtesy of being advised that he was considered to have used an alias, much less to know who said so, or when such a charge appeared. Not even the Warrant of Arrest [Ex. B attached to Hearing; R. T. 219] indicated that any alias was involved.

became a citizen, joined the United States army, opened offices for the practice of his profession, and obtained a diploma [R. T. 214].

This whole procedure took twenty minutes (Hrg. p. 12). How the Board could find any derogatory information from this "evidence" passes the bounds of reason.

But passing over this purported "hearing" in 1941, surely after respondent snatched petitioner away from the courts on the mainland in April 1942, there can be no possible reason for not having at least told petitioner what his incarceration was all about. Respondent concedes (Br. 11, f.n. 12) that thereafter "petitioner's case was reviewed in June 1942." But this "review," perforce, was still based upon the so-called "hearing" of December 1941 and still without petitioner's being given any notice or the slightest gleaning as to why he was being held. Could not petitioner have even been furnished with a letter telling him, even in brief résumé form, what it was that was being held against him? Petitioner surely tried as hard as he could to find out (*Cf.* Pet. Appx. G, pp. 47-49). But not even this modicum of due process was afforded.

In the *Parker* case, the court below required at least a minimum of due process when only the loss of a job was involved. In the instant case, not only was there loss of the opportunity to practice his profession, but petitioner's very liberty was also taken away.

While it is true that the *Toth* case is distinguishable from this case on the facts, yet in principle it is not. Indeed, petitioner's case is even stronger. Petitioner, during none of the time involved, was ever a soldier. Toth at least would get due process if tried by court martial.

Petitioner was not even afforded the minimum due process of trial before a military commission. (*Cf. Ex parte Quirin,* 317 U. S. 1.) Yet respondent would not even trust such a body [Emmons Dep. 20; R. T. 373]. And all this is coupled with the fact that by snatching petitioner from the mainland, respondent would not permit the judicial process to operate.

This court has shown its continued interest in the problem of the "faceless informer" by granting certiorari in *Cole v. Young,* No. 442, 24 Law Week 3155. Certainly the considerations in the instant case are equally substantial.

Conclusion.

In his book, *American Democracy and Military Power,* (University of Chicago Press, 1951) Smith holds that one of the five elements necessary to insure democratic civil controls is that (p. 15) "the courts (be) in a position to hold the military accountable for the protection of the basic democratic rights of the people of the nation." This court in *Ex parte Quirin,* 317 U. S. 1, 19 ("the duty . . . rests on the courts, in time of war as well as in peace, to preserve unimpaired the constitutional safeguards of civil liberty") has said the same thing. Respondent's action here thwarted that principle. Indeed, says Smith (p. 261), the "principal responsibility (of the judicial branch of the government) is that of restraint, lest the military usurp the powers of government or extinguish the liberties of the citizen." And pointing out (p. 278) that it is the duty of the military to strengthen the hand of civil agencies instead of usurping civil authorities, the author said *(ibid.)* "it is the rule . . . for

the military commander to turn over to the civil courts all civilians charged with offenses against the laws." Respondent did just the contrary here, and to an extreme degree.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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